Supreme Court, U.S.
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In The

Supreme Court of the United States

HARRY ALEMAN,

Petitioner,

v.

JERRY L. STERNES,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

MARC W. MARTIN
Counsel of Record
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111

ALEXANDER SALERNO
53 W. Jackson Blvd., Suite 824
Chicago, IL 60604
(312) 786-9991
Attorneys for Petitioner
Harry Aleman

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Did *Brecht v. Abrahamson*, 507 U.S. 619 (1993), survive the Anti-Terrorism and Effective Death Penalty Act?

2. Whether *habeas corpus* relief or a hearing was warranted, or a certificate of appealability should have issued, where the State appellate court upheld the trial court's refusal to question petit jurors notwithstanding a petit juror's disclosure, during the midst of trial, that she had expressed fears and apprehension regarding jury service to the other jurors?

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PRAYER

Petitioner Harry Aleman respectfully prays that a writ of *certiorari* issue to review the judgment and order of the Seventh Circuit.

OPINION BELOW

The Seventh Circuit's opinion affirming the district court's denial of Petitioner Harry Aleman's *habeas corpus* petition is published at 320 F.3d 687 and is attached in Appendix A.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment affirming the district court's denial of the petitioner's *habeas corpus* petition on February 19, 2003. This petition is timely as it is filed within 90 days of that judgment. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part, "nor shall any

State deprive any person of life, liberty, or property, without due process of law . . ."

3. Title 28, United States Code, § 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting

the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

4. Title 28, United States Code, § 2253 provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court

* * *

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made

a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

1. In 1977, the State of Illinois placed Petitioner Harry Aleman on trial for the murder of William Logan. Petitioner elected a bench trial and was acquitted. App. A-1.

2. In the mid-1980s, an attorney named Robert Cooley enlisted as an informant with the federal government. Cooley claimed that he had bribed the trial judge in the petitioner's case. Pet. C.A. Brief, p. 2.

Illinois reindicted the petitioner for the murder for which he had been acquitted. Petitioner protested, but did not prevail on interlocutory double jeopardy and due process claims. *See United States ex rel. Aleman v. Circuit Court of Cook County*, 967 F.Supp. 1022 (N.D. Ill. 1997), *aff'd*, 138 F.3d 302, *cert. denied*, 525 U.S. 868 (1998); *People v. Aleman*, 281 Ill.App.3d 991, 667 N.E.2d 615, *PLA denied*, 168 Ill.2d 600, 671 N.E.2d 734 (1996), *cert. denied*, 519 U.S. 1128 (1997).

3. Petitioner thus was retried. On the second day of the jury trial, it became known that one of the petit jurors, Brenda Smith, had violated the trial court's order not to discuss the case with anybody. "Worried about this case . . . where it's going and what could happen to" her, and

wanting to be discharged from jury duty, Juror Smith telephoned a prosecutor/acquaintance, and expressed fear, as well as a desire to be removed from the jury. Pet. C.A. Brief, p. 28.

The trial judge summoned Juror Smith into chambers. Juror Smith explained that "there are many witnesses who are not here to be able to testify these days, I mean, I don't know if that's all because of natural causes. Yes, it was 25 years ago, but, I don't know." Juror Smith affirmatively acknowledged that she had discussed her concerns with fellow jurors, and stated, "There have been times when we have said things or whatever when we walk in and we look at each other and kind of, you know, wow, that was you know –." The judge interjected, "That's not a discussion." Juror Smith initially acceded to this assessment, but when the judge asked whether she was sure that she had not discussed her concerns with other jurors, she again admitted that such discussions occurred, stating, "Yeah, I guess there are discussions then." Pet. C.A. Brief, pp. 28-29.

The court asked Juror Smith to explain the discussions. She stated: "Just basically, you know, like I said. I hope we're around after this, you know. We'll exchange Christmas cards and, you know, hopefully we are all around at Christmas time, just things like that. We just kind of lightheartedly, you know, talked about it." After the judge inquired whether jurors had violated his order not to talk about the case, Juror Smith said: "Conversations? I – not really conversations then maybe . . . I think not." Pet. C.A. Brief, p. 29.

Shortly thereafter, the following colloquy occurred:

THE COURT: But you are telling me you have not specifically discussed with any of the other 15 jurors your apprehensions about being here on jury duty, particularly for this case, sitting on this case?

JUROR SMITH: No, I think – I think they possibly know.

THE COURT: I – not just about what they know; I'm asking you about what you discussed.

JUROR SMITH: I feel I've discussed it because I said I haven't been sleeping at night.

THE COURT: Saying you haven't been sleeping at night isn't the same thing.

JUROR SMITH: Okay.

THE COURT: A lot of us have not been sleeping at night. I don't sleep at night.

JUROR SMITH: Okay.

THE COURT: But I'm asking you if you discussed your fears because of the nature of this case or because certain witnesses you've now learned are no longer around for whatever reason, any apprehensions you may have, if any of this was articulated by way of conversation where people talked about where you told somebody died or somebody told you, not about the fact that the case may go on for a week or two, or you exchange Christmas cards, about the case and about your fears and apprehensions.

JUROR SMITH: Yes, I think other people probably know my fears and apprehensions.

THE COURT: How would they know that? How would they know that?

JUROR SMITH: Yes, I believe that maybe from – from voicing it, I guess, by saying that I haven't been sleeping because I'm nervous about this. Yeah, I feel that maybe I have.

THE COURT: Well, that's not the same thing as saying I'm scared about this case because of the people who are involved in it. I'm scared about my health, safety, and welfare. That's what I'm driving at, not whether you perceive that they know what they know you're thinking. I want to know what was said.

JUROR SMITH: If I said those actual words?

THE COURT: Yes.

JUROR SMITH: I don't remember saying those actual words.

THE COURT: All right. So, you do remember saying that you're not sleeping?

JUROR SMITH: Right.

THE COURT: That you don't know how long the case is going to take, concerned about that. Anything else?

JUROR SMITH: Not that I remember.

Pet. C.A. Brief, pp. 29-30.

The petitioner moved for a mistrial, and alternatively requested inquiry of the remaining jurors. The judge denied the mistrial motion, and refused to question the remaining jurors since he did not "get the feeling at this point that [Juror Smith] has expressed, she has verbalized

to them any of the concerns that she has expressed to us." The court also feared uncovering "some kind of hornet's nest." Pet. C.A. Brief, p. 31.

4. At trial, the State presented the testimony of Louis Almedia, a career criminal who claimed that he had participated in the murder with the petitioner. The State also called Robert Lowe, who maintained that he had witnessed the shooting. The testimony of the two witnesses was inconsistent on many points. Both witnesses testified that, after Logan was struck by shotgun blasts, they saw the gunman, identified in court as the petitioner, fire shots with a handgun. The State, however, failed to produce any physical evidence of handgun shots. Pet. C.A. Brief, pp. 8-9.

In addressing the State's failure to produce physical evidence of a handgun shot during closing argument, the prosecutor theorized that the petitioner "could have shot at the dog, that he could have shot at Bobby Lowe, or that he could have shot at Logan and missed. We don't know. Harry Aleman knows." Pet. C.A. Brief, p. 15.

Later during the closing arguments, the prosecutor directly referred to the petitioner's failure to testify, stating:

> Ladies and gentlemen, none of us would be in this courtroom, none of this would be in this room if it wasn't for Harry Aleman. That's why we are here. Don't ever take the focus off of that. Don't ever take the focus off of that.
>
> He's the only one in this room who didn't come on this witness stand and talk about accepting responsibility. And again, the defendant does not have to testify.

> MR. McNALLY [defense counsel]: Your Honor, objection to that. Move for a mistrial.
>
> THE COURT: Objection sustained.
>
> MR. LINEHAN [prosecutor]: You will be instructed as to that.
>
> But those other witnesses told you about their accepting of their responsibility.

Pet. C.A. Brief, p. 16.[1]

4. The jury convicted the petitioner, and the judge sentenced him to 100 to 300 years in the penitentiary. Petitioner appealed to the Illinois Appellate Court. The appellate court upheld the trial judge's refusal to question the jurors about whether they had discussed the case before deliberations. *People v. Aleman*, 313 Ill.App.3d 51, 729 N.E.2d 20, *PLA denied*, 191 Ill.2d 536, 738 N.E.2d 929, *cert. denied*, 531 U.S. 1152 (2000); App. D-17-19.

The appellate court found the prosecution's closing argument to be misconduct. Absent citing *Chapman v. California*, 386 U.S. 18 (1967), the appellate court refused to reverse on the basis of a harmless error doctrine. App. D-25-27.

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[1] These were not the only improper prosecution closing arguments. Prior to trial, the trial judge had entered a *limine* order barring references to organized crime. During closing argument, however, the prosecutor described the petitioner as having the "personality of a hitman." The prosecutor also attacked the integrity of defense counsel, stating, "But what [defendant's] attorneys have done is not unlike what was done in 1977 when it went to trial. Different form, different style. But they don't want you to follow the law." Pet. C.A. Brief, p. 15.

5. Petitioner filed a timely *habeas corpus* petition in federal district court. The district court denied the petition. *United States ex rel. Aleman v. Sternes,* 205 F.Supp.2d 906 (N.D. Ill. 2002); App. C.

The district court granted a certificate of appealability ("COA") on one issue, and denied the petitioner's remaining COA requests. App. B. The district court fashioned the COA issue as follows: "Did the Illinois appellate court unreasonably apply clearly established federal law when it held the prosecutor's comments about petitioner's refusal to testify did not violate his rights under the Fifth and Fourteenth Amendments to the United States Constitution?"

6. Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. That court, Judge Easterbrook writing, affirmed the denial of *habeas corpus* relief. The Seventh Circuit ruled that the harmless error standard enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), governed *habeas corpus* claims under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Aleman v. Sternes*, 320 F.3d 687 (7th Cir. 2003); App. A.

7. In his appellate brief, and in accordance with Seventh Circuit practice, *see Ouska v. Cahill-Masching*, 246 F.3d 1036, 1046 (7th Cir. 2001), the petitioner sought a COA on issues relating to the State courts' failure to order the questioning of the petit jurors after Juror Smith disclosed that she had discussed her fears and apprehensions with fellow jurors. The Seventh Circuit summarily rejected the petitioner's request. App. A-7.

REASONS FOR GRANTING THE PETITION

I. *BRECHT v. ABRAHAMSON*, 507 U.S. 619 (1993), DID NOT SURVIVE ENACTMENT OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT

In *Chapman v. California*, 386 U.S. 18, 24 (1967), this Court held that "the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict . . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court held that the *Chapman* harmless error standard does not govern *habeas corpus* claims. *Brecht* ruled that federal courts should apply the harmless error standard announced in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), *i.e.*, whether the federal constitutional error "had substantial and injurious effect or influence in determining the jury's verdict."

In *O'Neal v. McAninch*, 513 U.S. 432 (1995), this Court again addressed the harmless error standard in *habeas* cases. *O'Neal* found that "where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error," the *habeas* petitioner must prevail. *Id.* at 436-37.

The AEDPA went into effect after *Brecht* and *O'Neal*. The AEDPA requires a federal *habeas* court to determine whether the State court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Nothing in the

AEDPA expressly incorporates the *Brecht/O'Neal* standard.

Logical construction of § 2254(d)(1)'s language requires a federal *habeas* court to assess whether the State court's judgment was contrary to, or an unreasonable application of, the *Chapman* harmless error standard. Put another way, *Brecht* should be deemed inapplicable to AEDPA *habeas* cases.

In formulating the AEDPA's standard of review, Congress easily could have enacted *Brecht's* language. But it did not. As opposed to enacting a *Brecht*-based standard, Congress mandated that federal courts evaluate *habeas* claims to determine whether the State court issued a decision contrary to, or unreasonably applied, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Given this statutory standard, there is no need to fill in a statutory gap, as in *Brecht.* The AEDPA's language dictates that a federal *habeas* court should determine whether the State court's decision contravenes or unreasonably applied *Chapman.*

As the Seventh Circuit noted in this case, App. A-4, there is judicial disagreement over the point. *Compare Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) (*dicta*) ("We are not convinced that the AEDPA did not abrogate the requirement that federal *habeas* courts conduct a harmless error analysis under *Brecht* in situations . . . [w]here the state court already has conducted a *Chapman* harmless error analysis . . .") *with Herrera v. Lemaster*, 301 F.3d 1192, 1198 (10th Cir. 2002) (*en banc*) ("applying *Brecht* to cases governed by AEDPA would not run counter to the Act's purpose"); *Sanna v. DiPaolo,* 265 F.3d 1, 14 (1st Cir. 2001) ("Although there is some disagreement as to whether the *Brecht* standard survives the

passage of the AEDPA . . . [w]e have consistently employed *Brecht* in cases arising under the AEDPA."); *Bulls v. Jones*, 274 F.3d 329, 335 (6th Cir. 2001) ("We have confirmed that the *Brecht* test continues to apply after the enactment of the" AEDPA.).

This Court has not directly addressed the issue of whether *Brecht* survives the AEDPA. In two post-AEDPA cases, this Court applied a *Brecht*-like standard absent discussing the issue. *See Early v. Packer*, ___ U.S. ___, 123 S.Ct. 262, 366 (2002); *Penry v. Johnson*, 532 U.S. 782, 795 (2001). In light of the AEDPA's plain language, the recurring nature of the issue and the judicial disagreement identified above, this case is worthy of *certiorari*.[2]

II. JURY MISCONDUCT ISSUES WARRANT *HABEAS CORPUS* RELIEF, A HEARING AND/OR THE ISSUANCE OF A COA

1. The district court denied the petitioner's request for a COA on issues relating to Juror Smith. App. B. The

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[2] This is not a case in which the petitioner's quest for *habeas* relief fails under all standards. A case simply cannot be considered "overwhelming" when it was based upon the word of an inherently unreliable career criminal (Louis Almedia) who first implicated the petitioner to secure release from hard prison time, and the story of a "witness" (Robert Lowe) who did not tell the police what he "witnessed" on the night of the offense. Moreover, the State's two main witnesses did not corroborate each other on simple, yet critical, events such as the time of the offense, the home Logan exited, the presence of a dog, the gunman's exit from the vehicle and the vehicle's get-away speed. Furthermore, Almedia and other witnesses did not even observe Lowe in the area around the time of the shooting. In addition, the forensic evidence did not corroborate the witnesses' claims that the gunman fired a third shot from a handgun into Logan's prone body. Pet. C.A. Brief, pp. 23-24.

Seventh Circuit, too, denied a COA on such issues, deferring to the district court and summarily stating that the issues were not "substantial." App. A-7.

The lower courts' decisions both preceded this Court's opinion in *Miller-El v. Cockrell*, ___ U.S. ___, 123 S.Ct. 1029 (2003). Accordingly, the judgment should be vacated and the cause remanded for reconsideration in light of *Miller-El*.

2. On the merits, the district court found that Juror Smith only made a vague reference about an inability to sleep. App. C-10-11. The Seventh Circuit offered no substantive discussion on the point. The record, however, shows that Juror Smith did much more than make a vague reference to her inability to sleep. Juror Smith made the following statements during colloquy with the State trial court:

- "There have been times when we have said things."
- "Yeah, I guess there are discussions then."
- "Just basically, you know, like I said. I hope we're around after this, you know. We'll exchange Christmas cards and, you know, hopefully we are all around at Christmas time, just things like that. We just kind of lightheartedly, you know, talked about it."
- "No, I think – I think they possibly know." (In response to the judge's negative question of: you have not specifically discussed your apprehensions with the other jurors.)
- "I feel I've discussed it because I said I haven't been sleeping at night."

- "Yes, I think other people probably know my fears and apprehensions."
- "Yes, I believe that maybe from – from voicing it, I guess, by saying that I haven't been sleeping because I'm nervous about this. Yeah, I feel that maybe I have."

Pet. C.A. Brief, pp. 29-31, 33-34.

Based on Juror Smith's utterances themselves, the petitioner plainly rebutted the presumption of correctness that attached to the State courts' findings (*i.e.*, that Juror Smith did not discuss her fears and apprehensions with fellow jurors). At a very minimum, there was sufficient evidence to warrant a hearing involving questioning of all the petit jurors.

In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court construed 28 U.S.C. § 2254(e)(2) and found that an evidentiary hearing on a *habeas* claim is not barred if the petitioner diligently pursued his claim in the State court. That is what occurred here. Following the trial court's questioning of Smith, the petitioner requested questioning of the remaining jurors. The trial court, however, spurned this request. Petitioner raised the issue in his motion for new trial. On appeal, the petitioner moved for a new trial or a remand for a hearing in which all the jurors would be questioned. The issue was again asserted in the petitioner's Illinois Supreme Court petition for leave to appeal. In view of the petitioner's repeated requests for a full hearing in the State court, the petitioner cannot be faulted for lack of diligence. As *Williams v. Taylor* held, § 2254(e)(2)'s restrictions do not foreclose a hearing.

The district court erred in determining that this Court's cases did not require a hearing involving questioning of all jurors. In remanding for an evidentiary hearing in *Williams v. Taylor*, this Court stated that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 529 U.S. at 445 (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982)). Moreover, *Remmer v. United States*, 347 U.S. 227, 229-30 (1954), held that when the specter of unauthorized jury communications arises, the trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." And when *Remmer* reached this Court for a second time, this Court stressed that "it was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing." *Remmer v. United States*, 350 U.S. 377, 379-380 (1956). This Court thus has held that a defendant is entitled to a "full hearing" when evidence of jury bias is raised. *See also United States v. Davis*, 177 F.3d 552 (6th Cir. 1999); *United States v. Brantley*, 733 F.2d 1429, 1438-41 (11th Cir. 1984); *United States v. Forrest*, 620 F.2d 446, 456-59 (5th Cir. 1980).

The district court's decision refusing to hold a hearing on the petitioner's jury misconduct claim contravened this Court's cases. Accordingly, *certiorari* should be granted.

CONCLUSION

WHEREFORE, Petitioner Harry Aleman respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to vacate or review the judgment of the Seventh Circuit, remand for further consideration and/or grant any other appropriate relief.

Respectfully submitted,

MARC W. MARTIN
Counsel of Record
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111

ALEXANDER SALERNO
53 W. Jackson Blvd., Suite 824
Chicago, IL 60604
(312) 786-9991
Attorneys for Petitioner
Harry Aleman

APPENDIX A

320 F.3d 687

United States Court of Appeals,
Seventh Circuit.

Harry ALEMAN, Petitioner-Appellant,
v.
Jerry L. STERNES, Warden, Dixon Correctional Center, Respondent-Appellee.

No. 02-2874.

Argued Jan. 29, 2003.
Decided Feb. 19, 2003.

Marc W. Martin, Chicago, IL, Alexander M. Salerno (argued), Berwyn, IL, for Petitioner-Appellant.

Domenica Osterberger (argued), Office of the Atty. Gen., Chicago, IL, for Respondent-Appellee.

Before COFFEY, EASTERBROOK, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Charged with murder, Harry Aleman bribed Judge Frank Wilson (of the Circuit Court of Cook County) to secure an acquittal. Wilson committed suicide in 1990 on learning that news of this and other corruption had reached federal investigators. Already in prison on unrelated federal convictions, see *United States v. DiDomenico,* 78 F.3d 294 (7th Cir.1996); *Aleman v. United States,* 878 F.2d 1009 (7th Cir.1989); *United States v. Aleman,* 609 F.2d 298 (7th Cir.1979), Aleman was tried again for the murder, after we held that his trial before Judge Wilson had been a sham that did not place him in jeopardy of conviction, so that a new trial would not be a second

jeopardy. *Aleman v. Circuit Court of Cook County,* 138 F.3d 302 (7th Cir.1998). This time he was convicted. His sentence is 100 to 300 years' imprisonment. After the state judiciary rejected his constitutional objections, *People v. Aleman,* 313 Ill.App.3d 51, 246 Ill.Dec. 20, 729 N.E.2d 20 (2000), he sought collateral relief under 28 U.S.C. § 2254 and lost again. *Aleman v. Sternes,* 205 F.Supp.2d 906 (N.D.Ill.2002). The district judge issued a certificate of appealability limited to a single issue: whether the prosecutor's reference to Aleman's failure to take the stand violated his right to due process of law.

During closing argument, the prosecutor twice alluded to the fact that Aleman had not testified. According to the prosecutor, Aleman was "the only one in this room who didn't come on this witness stand and talk about accepting responsibility" as others involved in the shooting had done. Aleman's lawyer objected, and the judge sustained the objection. Later, when discussing evidence that three shots had been heard (though only two bullets struck Billy Logan, the victim), the prosecutor asked the jury to infer that Aleman had fired three times: "either he shot at the dog or he shot at Bobby Lowe, or even perhaps . . . [he shot] again at Billy Logan and missed. We don't know. Harry Aleman knows. We don't know." Aleman's lawyer did not object to this statement. The court instructed the jury that Aleman was not required to testify and that his decision not to do so "must not be considered by you in any way in arriving at your verdict." This instruction shows the gap between what happened in Aleman's trial and what happened in *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), where the jury was told that it could draw an adverse inference from the accused's failure to testify. What *Griffin* condemns is equating

silence with evidence of guilt, which undermines the privilege against compulsory self-incrimination. Reminding jurors of something they already know – that the defendant did not testify – could be a back-door invitation to draw the forbidden inference, but when it is not there is no constitutional problem. See *United States v. Robinson,* 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (recognizing a distinction between an adverse inference and a simple reference to silence); *Portuondo v. Agard,* 529 U.S. 61, 69, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) ("*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of *guilt*' " (emphasis in original)). Cf. *Greer v. Miller,* 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (instruction to jury not to draw any inference from silence means that prosecutor's quest for such an inference has been thwarted, and no constitutional error has occurred).

Without citing *Griffin, Robinson, Miller,* or *Portuondo,* or discussing the significance of defense counsel's decision not to object to the prosecutor's second statement, the state's appellate court condemned the prosecutor's argument as misconduct. 313 Ill.App.3d at 66-69, 246 Ill.Dec. 20, 729 N.E.2d at 34-35, relying on *People v. Blue,* 189 Ill.2d 99, 244 Ill.Dec. 32, 724 N.E.2d 920 (2000). The appellate court may have thought that the remarks violated the Constitution of the United States as well as norms of state law, though it did not say. It went on to conclude that any error was harmless because the presiding judge repeatedly instructed the jury that a defendant need not testify and that no inference could be drawn from Aleman's exercise of his privilege to remain silent. See also *Lakeside v. Oregon,* 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

What Aleman now argues is that, because the state appellate court did not explicitly hold that the prosecutor's comments were harmless beyond a reasonable doubt – the right standard for evaluating on direct appeal claims of constitutional errors, see *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) – the state judiciary has rendered "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". 28 U.S.C. § 2254(d)(1). Illinois contends that any error by the state court in applying the *Chapman* standard is irrelevant, because the harmless-error question on collateral review is whether a constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). See also *O'Neal v. McAninch,* 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). Aleman replies that § 2254(d), as amended in 1996 by the Antiterrorism and Effective Death Penalty Act, jettisons *Brecht* and replaces it with the question whether the state judiciary unreasonably applied the *Chapman* standard. If yes, Aleman contends, he is entitled to collateral relief; the state does not get a second try under the more lenient approach of *Brecht.* Aleman's argument has some support in *Whitmore v. Kemna,* 213 F.3d 431, 433 (8th Cir.2000) (dictum), but has been rejected by every appellate decision that has tackled the subject head-on. See *Herrera v. Lemaster,* 301 F.3d 1192, 1199-1200 (10th Cir.2002) (en banc); *Bulls v. Jones,* 274 F.3d 329, 335 (6th Cir.2001); *Sanna v. Dipaolo,* 265 F.3d 1, 14- 15 (1st Cir.2001). We reserved the question in *Harding v. Walls,* 300 F.3d 824, 828 n. 2 (7th Cir.2002), but the time to choose has arrived: we agree with these decisions.

Aleman's premise is that if a state court renders a decision contrary to, or unreasonably applying, federal law, then the prisoner is *entitled* to a writ of habeas corpus. This is not, however, what § 2254(d) says. It begins: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* with respect to any claim that was adjudicated on the merits in State court proceedings *unless*" certain things are true. (The emphasis in this quotation is ours.) Unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law", collateral relief "shall not be granted". If the state court's opinion *was* unreasonable – or if the state judiciary did not address the constitutional claim, despite an opportunity to do so – then § 2254(d) no longer applies. A prisoner still must establish an entitlement to the relief he seeks, and it is § 2254(a), not § 2254(d), that sets the standard: the court issues "a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Whether a given prisoner's custody violates the Constitution, laws, or treaties of the United States depends, first, on whether all substantive rules have been respected (the merit of the claim) and, second, on whether any error *caused* the custody. That is where *Brecht*'s harmless-error doctrine enters; a harmless error did not play a causal role and thus does not justify collateral relief. Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome.

Twice since the AEDPA's enactment the Supreme Court has used the *Brecht* standard on collateral review. See *Early v. Packer*, ___ U.S. ___, ___, 123 S.Ct. 362, 366, 154 L.Ed.2d 263 (2002); *Penry v. Johnson*, 532 U.S. 782, 795, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001). It did not explain why, in its view, *Brecht* survives the amendment to § 2254(d). Maybe the question was not briefed, or perhaps the Justices thought the answer obvious. For the reason we have just given, the answer *is* obvious, so we are not inclined to dismiss the language of *Early* and *Penry* as incautious dicta. Other courts of appeals have disagreed about the sequence of decision. *Herrera* held that before turning to *Brecht* the federal judiciary must determine that the state judiciary applied *Chapman* unreasonably. *Bulls*, on the other hand, concluded that it makes sense to start with *Brecht* – for if the error had a substantial and injurious effect then any conclusion that the error was harmless beyond a reasonable doubt must have been unreasonable, while if the error did not have a substantial and injurious effect then the *Chapman* inquiry can be bypassed. *Early* approached the sequence the same way *Herrera* did (though without holding that this is compelled), and we suspect that most of the time this choice depends on prudence rather than obligation. Unless its jurisdiction is at stake, a court may take up issues in whatever sequence seems best, given the nature of the parties' arguments and the interest in avoiding unnecessary constitutional decisions. Compare *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), with *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

Here the sequence of analysis matters not at all. The state's court of appeals did not mention *Chapman* because

it apparently did not think that the federal Constitution had been violated. It applied a state-law standard of harmlessness to what it saw as an error of state law by the prosecutor. Given the trial judge's anti-inference instruction, this is an appropriate perspective. Even if the instruction were deemed inadequate, and even if the prosecutor's argument were treated as an implied request to use Aleman's silence as substantive evidence against him, that fleeting argument was so peripheral to this trial that no substantial and injurious result came to pass. We are confident that the jury convicted Aleman based on the evidence actually introduced, not on speculations about the significance of missing testimony. Thus Aleman's custody does not violate the federal Constitution, see § 2254(a), and he is not entitled to collateral relief.

Aleman presents arguments about issues in addition to the one identified in the certificate of appealability. Like the district judge, we conclude that none of these is substantial, so we decline his request to expand the certificate.

AFFIRMED

APPENDIX B

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Suzanne B. Conlon	**Sitting Judge If Other than Assigned Judge**	
CASE NUMBER	02 C 1025	**DATE**	7/17/2002
CASE TITLE	U.S.A. ex. rel. HARRY ALEMAN vs. JERRY STERNES		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due ___. Reply to answer brief due ___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]
☐ FRCP 4(m) ☐ General Rule 21 ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)

(10) ■ [Other docket entry] Petitioner's motion for a certificate of appealability [20-1] is granted in part. Petitioner is granted a certificate of appealability on the following issue: did the Illinois appellate court unreasonably apply clearly established federal law when it held the prosecutor's comments about petitioner's refusal to testify did not violate his rights under the Fifth and Fourteenth Amendments to the United States Constitution? The motion is denied in all other respects. SEE REVERSE FOR DETAILS.

/s/ Suzanne B. Conlon

(11) ■ [For further detail see order on the reverse side of the original minute order.]

	No notices required, advised in open court.	
	No notices required	
✓	Notices mailed by Judge's staff.	(Filed July 18, 2002)
	Notified counsel by telephone.	
	Docketing to mail notices.	

☐	Mail AO 450 form.	
☐	Copy to judge/magistrate judge.	
CB	Courtroom deputy's initials	**Date/time received in central Clerk's Office**

Number of Notices	**Document Number**
Jul 19 2002 **Date docketed**	23
/s/ M **docketing deputy initials**	
7/17/2002 **date mailed notice**	
/s/ PW **mailing deputy initials**	

(Reserved for use by the Court)

ORDER

Harry Aleman petitioned for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The petition alleged various errors in Aleman's trial: improper jury communications, jury security measures and jury selection, due process violations from the trial judge's evidentiary rulings, and prosecutorial misconduct. This court denied Aleman's petition for *habeas* relief. *See Aleman v. Sternes*, No. 02 C 1025, 2002 WL 116050 (N.D. Ill. May 30, 2002). Aleman seeks a certificate of appealability.

Pursuant to Fed. R. App. P. 22(b), a district court must either issue a certificate of appealability or state reasons why a certificate should not issue. The certificate of appealability may only issue if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(3)(2). When a district court has rejected the constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the court grants a certificate of appealability, it must indicate the specific issue for appeal. 28 U.S.C. § 2253(c).

Prosecutorial Misconduct. The Illinois appellate court determined the prosecutor's comments about Aleman's failure to testify did not violate his Fifth and Fourteenth Amendment rights. *People v. Aleman*, 313 Ill. App. 3d 51, 67, 729 N.E.2d 20, 34 (1st Dist. 2000). In denying *habeas* relief, this court recognized the prosecutor's comments during closing arguments were clearly improper. But this court held the trial judge's curative instructions and the weight of the evidence established that the Illinois appellate court's decision was not incorrect *and* unreasonable. *Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997) (a state court's decision must stand if it is one of several equally plausible outcomes). Nevertheless, the Fifth Amendment strictly prohibits a prosecutor from commenting on a defendant's refusal to testify. *Griffin v. California*, 380 U.S. 609, 614 (1965). The Illinois appellate court recognized the prosecutor's comments reflected "a calculated attempt to draw attention to" defendant's refusal to testify. *Aleman*, 313 Ill. App. 3d at 67, 729 N.E.2d at 34. Reasonable

jurists could differ about this court's assessment of Aleman's prosecutorial misconduct claim. Accordingly, the court grants Aleman a certificate of appealability on the following issue: Did the Illinois appellate court unreasonably apply clearly established federal law when it held the prosecutor's comments about Aleman's refusal to testify did not violate his rights under the Fifth and Fourteenth Amendments to the United States Constitution?

Juror Communication. Aleman asserts reasonable jurists court differ about whether the trial judge's refusal to conduct a jury *voir dire* concerning purported improper comments by juror Brenda Smith violated his right to a fair and impartial jury. After repeated questioning by the trial judge, Smith conceded she had only articulated her inability to sleep to other jurors. Smith could not point to statements or discussions where she articulated her fears or apprehensions to the jury. *See e.g.* Tr., vol. IX, at D-8. ("There have been times when we have said things or whatever when we walk in and we look at each other and kind of, you know, wow, that was you know . . . "). Reasonable jurists could not find this court's decision debatable or wrong.

Aleman seeks a certificate of appealability on the court's denial of his request for an evidentiary hearing. Aleman claims he alleged facts which, if proven, would entitle him to relief and the state court failed to consider the evidence at a full and fair hearing. *Matheney v. Anderson*, 253 F.3d 1025, 1029 (7th Cir. 1997); *Hampton v. Leiback*, No. 99 C 5473, 2001 WL 1518533, at *12-13 (N.D. Ill. Nov. 29, 2001). However, Aleman's allegation of improper jury communications did not establish that he was entitled to *habeas* relief or an evidentiary hearing. The trial judge questioned juror Smith in detail. No facts were

established that warranted an evidentiary hearing. The trial judge held Smith did not relay her fears or apprehensions to other jury members. The trial judge's finding is presumed correct on *habeas* review. *See* 28 U.S.C. § 2254(d); *Mendiola v. Schomig*, 224 F.3d 589, 593 (7th Cir. 2000) (§2254(d)'s presumption of correctness applies even though the trial judge determines facts without an evidentiary hearing). Reasonable jurists would not find this court's denial of Aleman's *habeas* request for an evidentiary hearing debatable or wrong. *See Whitehead v. Cowan*, 263 F.3d 708,722 (7th Cir. 2001) (evidentiary hearing is not required where petitioner speculates about jury bias). Accordingly, Aleman is not entitled to a certificate of appealability on his improper juror communication claim.

Jury Security Measures. Aleman seeks a certificate of appealability on his claim that the jury was subjected to unreasonable security measures. This court determined the use of metal detectors and the escort of the jury by sheriffs did not violate clearly established federal law on Aleman's right to a fair and impartial jury. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986); *Hellum v. United States Penitentiary Leavenworth*, 28 F.3d 903, 907 (8th Cir. 1994). Reasonable jurists could not find this court's decision debatable or wrong. A certificate of appealability is unwarranted.

Jury Selection. This court determined the trial judge's holding of *voir dire* until 9:30 p.m. without a dinner break did not violate clearly established federal law. Aleman failed to point to authority that an extended *voir dire* violates his right to an impartial jury. Nor did Aleman explain the manner in which a lengthy *voir dire* denied him an impartial jury. Aleman fails to make a substantial showing of a

denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A certificate of appealability is unwarranted.

Admission of Other Crimes Evidence. *Habeas* relief is appropriate based on state court evidentiary rulings only if the ruling denied the defendant the right to a fundamentally fair trial. *Abrams v. Barnell*, 121 F.3d 1036, 1042 (7th Cir. 1997). Aleman contested the trial judge's decision to admit evidence of Judge Wilson's bribery, references to the First Ward organization, Aleman's commission of a home invasion crime, and Judge Wilson's suicide. The Illinois appellate court determined the trial judge's rulings were proper under Illinois law. *Aleman*, 313 Ill. App. 3d at 62, 729 N.E.2d at 32. This court held these evidentiary rulings did not result in a fundamentally unfair trial. Judge Wilson's suicide was not in evidence; a state witness made an inadvertent and vague reference to a judge who committed suicide. Judge Wilson was not mentioned by name. This court declined to consider Aleman's other conclusory arguments about evidentiary errors because they were undeveloped and without citation to the record or authority. *See e.g. Habeas* Petition, at 15 (claims of undercover police tactics, illegal gambling, and fixed court cases).

Further, this court held Aleman was not denied a fundamentally fair trial when the trial judge conditioned Aleman's admission of Judge Wilson's prior factual findings on the state's ability to rebut with evidence of Judge Wilson's suicide. *See Cupp v. Noughten*, 414 U.S. 141, 147 (1973). Similarly, Aleman failed to disclose Dr. Herbert MacDonnell's expert testimony about the manner in which Logan was shot until Dr. MacDonnell was called as a witness at trial. *See* Ill. Sup. Ct. Rule 413. The Illinois appellate court affirmed the trial court's exclusion of the expert testimony

for the discovery violation. To grant a certificate of appealability, reasonable jurists must find this court's decision incorrect or debatable. The trial judge's evidentiary rulings were consistent with Illinois law; they were affirmed by the Illinois courts. This court determined the evidentiary rulings did not result in a fundamentally unfair trial. Aleman fails to establish his claims about state court evidentiary errors warrant a certificate of appealability.

/s/ Suzanne B. Conlon

APPENDIX C

205 F.Supp.2d 906

United States District Court,
N.D. Illinois,
Eastern Division.

UNITED STATES of America ex rel. Harry ALEMAN Petitioner,

v.

Jerry STERNES Respondent.

No. 02 C 1025.

May 30, 2002.

Marc William Martin, Marc W. Martin, Ltd., Chicago, IL, for Harry Aleman.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

Petitioner Harry Aleman seeks a writ of *habeas corpus* to vacate his murder conviction pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

On September 27, 1972, Billy Logan was murdered on West Walton Street in Chicago, Illinois. In December 1976, Aleman was charged with Logan's murder in the Circuit Court of Cook County. Following a bench trial before Judge Frank Wilson in May 1977, Aleman was acquitted. Several years later, federal investigators uncovered evidence that Judge Wilson accepted a $10,000 bribe to acquit Aleman. In February 1990, Judge Wilson was informed of an FBI investigation into the bribery. Shortly

thereafter, he committed suicide. In December 1993, Aleman was charged again with Logan's murder. Logan moved to dismiss the murder charge on double jeopardy grounds. The Circuit Court of Cook County held double jeopardy did not bar Aleman's prosecution. The ruling was affirmed, *People v. Aleman,* 281 Ill.App.3d 991, 217 Ill.Dec. 526, 667 N.E.2d 615 (1996), and the Illinois Supreme Court denied Aleman's petition for leave to appeal. *People v. Aleman,* 168 Ill.2d 600, 219 Ill.Dec. 567, 671 N.E.2d 734 (1996). The United States Supreme Court denied Aleman's petition for writ of *certiorari. Aleman v. Illinois,* 519 U.S. 1128, 117 S.Ct. 986, 136 L.Ed.2d 868 (1997). Aleman then filed a petition for a writ of *habeas corpus.* This court denied Aleman's § 2255 petition. *United States v. Circuit Court of Cook County,* 967 F.Supp. 1022 (N.D.Ill.1997). Addressing an issue of first impression, this court held the bribery of Judge Wilson reduced Aleman's trial to a sham; the trial did not implicate the risk of conviction necessary to raise double jeopardy concerns. *Id.* at 1027-29. The Seventh Circuit affirmed, *Aleman v. The Honorable Judges of the Circuit Court of Cook County,* 138 F.3d 302 (7th Cir.1998), and the Supreme Court denied Aleman's writ of *certiorari. Aleman v. Circuit Court of Cook County,* 525 U.S. 868, 119 S.Ct. 162, 142 L.Ed.2d 132 (1998). Meanwhile, Aleman was found guilty of Logan's murder in a second jury trial on September 30, 1997. Aleman appealed; his conviction and sentence were affirmed. *People v. Aleman,* 313 Ill.App.3d 51, 246 Ill.Dec. 20, 729 N.E.2d 20 (1st Dist.2000). The Illinois Supreme Court denied leave to appeal. Aleman filed a writ of *certiorari* in the United States Supreme Court. The petition was denied. *Aleman v. Illinois,* 531 U.S. 1152, 121 S.Ct. 1097, 148 L.Ed.2d 969 (2001).

BACKGROUND

The factual findings of a state trial or appellate court are presumed correct in a federal *habeas* proceeding unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). There is no evidence before the court to rebut this presumption. Accordingly, the court adopts the Illinois appellate court's statement of facts.[1] *See Aleman,* 313 Ill.App.3d at 54, 246 Ill.Dec. 20, 729 N.E.2d at 25.

Logan lived with his two sisters, one named Betty Romo. On September 27, 1972, Logan left his home for work at 11:00 p.m. Romo heard three loud noises or shots. Running outside, she discovered Logan bleeding from two shotgun wounds. Logan had been divorced from Phyllis Napoles, Aleman's cousin. Logan and Napoles were engaged in a custody battle. Logan had been arrested for her assault and battery.

At trial, Bobby Lowe, Logan's neighbor, testified that on September 27th, he observed a vehicle parked across the street with its engine running; he saw Logan walking to his parked automobile. As Lowe approached Logan, Lowe observed the other vehicle moving towards Logan. Lowe heard two loud noises and saw Logan "fly backwards." Tr., Vol. VIII, p. A-160. Lowe witnessed Aleman leaving from the passenger side of the vehicle. Aleman approached Logan with a gun-like object in his hand, and

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[1] The Illinois appellate court issued two opinions on Aleman's direct appeal – a published opinion at 313 Ill.App.3d 51, 246 Ill.Dec. 20, 729 N.E.2d 20 (1st Dist.2000), and a 19-page unpublished order included in the *habeas* petition record at Volume I, Ex. E.

pointed it at Logan. Lowe stared at Aleman for four or five seconds, standing three or four feet away, then turned and ran. While running, Lowe heard another loud noise; he also heard the vehicle drive away. In 1972, Lowe identified Aleman in a photospread; in 1976, he identified Aleman as Logan's shooter.

In March 1975, Louis Almeida was arrested for possession of weapons and a silencer. Almeida provided police with information about his criminal activities, including armed robberies, vehicle thefts, and bombings. Almeida reported details of Logan's murder – identifying himself as the driver and Aleman as the shooter. In exchange, Almeida was given immunity from prosecution for Logan's murder. According to Almeida, in August 1972, Aleman discussed his plan to murder Logan and offered Almeida two license plate numbers and Logan's home and work addresses, writing "Death to Billy" on the same piece of paper. *Id.* at B-43. Almeida stalked Logan to learn his habits and schedule.

Almeida further testified to the following facts. On September 27, 1972, Aleman, armed with a shotgun and a .45 caliber handgun, was driven by Almeida to Logan's home. At 11:15 p.m., Aleman saw Logan. Almeida drove the vehicle near Logan. Almeida called to Logan. Logan walked towards him. Aleman shot Logan twice with a 12-gauge shotgun. Logan "flew back" and began crawling and yelling for a doctor. *Id.* at B-51. Aleman stepped half-way out of the car, but "shut the door on the car and [said], let's go, he's gone." *Id.* at B-52.

Aleman presented several witnesses, including William Dietrich, Logan's nephew, and Stanley Ryba, Logan's neighbor. Dietrich, who lived with Logan on September 27,

1972, was asleep on the front porch at 11:00 p.m. Dietrich awoke to hear someone say, "hey, Bill, come here." Tr., Vol. XI, at p. F-85. Immediately hearing two gunshots, he looked outside and saw Logan on his knees, falling backwards. Dietrich did not see anyone on the street at that time. Ryba testified that at 11:00 p.m., he heard a gunshot, looked out his window, and observed a car double-parked on the street and a man lying on the ground. Ryba stated he did not see anyone else in the area. Guido Calcagno, Almeida's friend, testified Almeida was "not very truthful" and had a "tendency to lie about everything." Tr., Vol. XII, at p. G-144. Police officers who investigated Logan's murder testified Lowe was initially reticent and fearful, and merely identified the occupants of the automobile as two white males.

William Jr., Logan's son, and Napoles suggested that Petrocelli, not Aleman, murdered Logan. Napoles described Logan as an abusive drunk. After her divorce from Logan in 1967, Napoles had a relationship with Petrocelli, who was violent and had a dark side. In March 1972, Logan kicked down the door of her home and threatened her while he was drunk. Petrocelli argued with Logan and a violent physical confrontation ensued. Petrocelli threatened to kill Logan.

The jury found Aleman guilty. He was sentenced to a prison term of not less than 100 years nor more than 300 years.

DISCUSSION

I. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996, Aleman cannot obtain *habeas* relief unless he establishes the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This court analyzes whether the Illinois appellate court's decision reasonably applied Supreme Court precedent to the facts of Aleman's case. A state court reasonably applies Supreme Court precedent if its application is "at least minimally consistent with the facts and circumstances of the case." *Spreitzer v. Peters,* 114 F.3d 1435, 1442 (7th Cir.1997). For *habeas* relief, the state court's decision must be both incorrect and unreasonable. *Washington v. Smith,* 219 F.3d 620, 628 (7th Cir.2000).

Aleman must satisfy two procedural requirements before the court may reach the merits of his *habeas* petition: (1) exhaustion of state remedies and (2) fair presentment of any federal claims to avoid procedural default. *Spreitzer v. Schomig,* 219 F.3d 639, 644 (7th Cir.2000). A *habeas* petitioner exhausts state remedies when he presents his claims to the highest state court for a ruling on the merits. *Farrell v. Lane,* 939 F.2d 409, 410 (7th Cir.1991). It is undisputed Aleman exhausted his state court remedies. Procedural default occurs when the petitioner fails to raise fairly and properly an issue on direct appeal or post-conviction review. *Moleterno v. Nelson,* 114 F.3d 629, 633-634 (7th Cir.1997). The state

concedes Aleman's claims were properly raised and presented to the Illinois courts on direct appeal. Finally, Aleman's § 2254 petition is timely because it was filed within § 2244(d)(2)'s one-year statute of limitations. *See Anderson v. Litscher,* 281 F.3d 672, 675 (7th Cir.2002).

II. Second or Successive *Habeas* Petition

At the outset, the state asserts this court lacks jurisdiction because Aleman's second *habeas* petition is barred under 28 U.S.C. § 2444. The AEDPA bars an individual from filing a second or successive *habeas* petition without obtaining leave from the appropriate court of appeals. 28 U.S.C. § 2244(b)(3). A pre-trial *habeas* petition brought to challenge an indictment on double jeopardy grounds must be treated as a § 2241 petition. *Jacobs v. McCaughtry,* 251 F.3d 596 (7th Cir.2001). A § 2254 petition must be brought by petitioners in custody pursuant to a judgment of a state court. *Id.* at 597 (citing *Walker v. O'Brien,* 216 F.3d 626, 633 (7th Cir.2000)). Section 2244's requirement that a second or successive *habeas* petition requires leave from the court of appeals applies to § 2254 petitions, not § 2241. *Id.* at 598; 28 U.S.C. § 2244.

The state acknowledges *Jacobs* is controlling precedent; the state argues this court and the Seventh Circuit previously identified Aleman's first *habeas* petition as a § 2254 petition. The decisions on Aleman's first *habeas* petition were issued before *Jacobs.* Subsequently, the Seventh Circuit determined a pre-trial *habeas* petition by a prisoner in pre-conviction custody does not fall within § 2254's requirement for second or successive petitions. *Jacobs,* 251 F.3d at 598. Accordingly, Aleman is not required

to seek leave from the federal court of appeals. The court addresses Aleman's claims on the merits.

III. Jury Communications (Claim I)

On the second day of trial, the trial judge was informed Brenda Smith, a juror, had communicated with an assistant state's attorney who was not involved in the case. Outside the presence of the jury, the trial judge questioned Smith. She explained she telephoned the assistant state's attorney because she "was just worried about this case and where it's going and what could happen to [her] as well as . . . family members [and] just wanted to know if there was anything [she] could do to take [herself] out of it." Tr., Vol IX, at p. D-4. The assistant state's attorney refused to speak with Smith.

The trial judge inquired further whether Smith discussed her concerns with anyone else. Smith initially answered "no," but when asked whether she discussed her concerns with other jurors, she answered, "Yeah. I mean, I guess – yeah. There have been times when we have said things or whatever when we walk in and we look at each other and kind of, you know, wow, that was, you know . . . " *Id.* at D-8. The court interrupted Smith, stating, "That's not a discussion." *Id.* Smith responded: "No I guess not then." *Id.* The court specifically questioned Smith whether she expressed her fears and concerns to other jurors. Smith claimed she and other jurors lightheartedly spoke about being around after the trial to exchange Christmas cards. *Id.* at D-9. Smith acknowledged she did not actually have conversations about her fears, she only discussed her insomnia. *Id.* at D-10. The court asked Smith if her fears would prevent her from deciding the case based upon the

evidence and the law; her response was equivocal. Aleman asked the court to remove Smith from the jury. The trial judge agreed, and discharged Smith. Aleman requested the court to *voir dire* other jurors about their conversations with Smith. The court denied the request because Smith had not expressed or verbalized her concerns to other jurors. The court determined Smith could not "pinpoint any discussion she had where she expressed her fear or apprehensions about Mr. Aleman or anybody else in the case." *Id.* at D-17. The Illinois appellate court recognized the trial judge "was in the best position to judge Juror Smith's responses." *Aleman,* 313 Ill.App.3d at 64, 246 Ill.Dec. 20, 729 N.E.2d at 32. The trial court determined Smith did not discuss the facts of the case or her fears with other jurors. Consequently, the appellate court held it was not reversible error for the trial court to decline questioning other jurors about communications with Smith.

Aleman contends he was denied a fair trial before an impartial jury in violation of the Fifth and Fourteenth Amendments. "The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." *Murphy v. Florida,* 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (internal quotations omitted). Aleman asserts the trial judge's ruling constitutes an unreasonable application of clearly established federal law, and resulted in an unreasonable determination of the facts based on the evidence presented in the state court proceeding. 28 U.S.C. § 2554(d)(1)-(2).

The determination of whether the jury was prejudiced is a question of fact. *Rushen v. Spain,* 464 U.S. 114, 120, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Under § 2254(d)'s presumption of correctness, the court will reverse a state

trial court determination only if the petitioner rebuts the presumption with clear and convincing evidence. After repeated questioning by the trial judge, Smith did not indicate she discussed her fears with the jury. *See Patton v. Yount,* 467 U.S. 1025, 1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (trial judge is in the best position to assess a juror's answer). Indeed, Smith felt the jury knew her fears because she stated she had not been sleeping at night. Aleman cannot establish the jury was tainted based on Smith's vague comment about sleeplessness. Aleman fails to rebut the presumption of correctness accorded to the state court's finding by clear and convincing evidence.

In addition, Aleman asserts the trial judge's refusal to question other jurors is an unreasonable application of federal law. Aleman argues any communication between jurors during trial about the trial's subject matter is presumptively prejudicial. A § 2254 petitioner must show the Supreme Court has clearly established the propositions essential to his position. *Mueller v. Sullivan,* 141 F.3d 1232, 1234 (7th Cir.1998). Indeed, a petitioner "must have a Supreme Court case to support his claim, and that Supreme Court decision must have clearly established the relevant principle [at] the time of his direct appeal." *Yancey v. Gilmore,* 113 F.3d 104, 106-107 (7th Cir.1997). Aleman advances *Williams v. Taylor,* 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), *Parker v. Gladden,* 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) and *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

Remmer is inapposite because its presumption of prejudice applies only when jurors engage in communications with non-jury members. *See Remmer,* 347 U.S. at 229-30, 74 S.Ct. 450; *see also Whitehead v. Cowan,* 263

F.3d 708, 722 (7th Cir.2001) (*Remmer* hearing is required only when third-parties contact jurors). Similarly, *Parker* is inapplicable because it involved outside influences that biased the jury. *Parker* found a constitutional violation because a bailiff stated to jurors that defendant was a "wicked fellow," and he was guilty. 385 U.S. at 365, 87 S.Ct. 468. *Williams* involved a clear instance of jury bias. *Williams* required an evidentiary hearing because a juror was previously married to a prosecution witness, and the juror was a former client of defense counsel; the juror failed to disclose those relationships during *voir dire*. 529 U.S. at 441-43, 120 S.Ct. 1479.

Smith expressed her inability to sleep to other jurors. There was no reasonable probability other jurors were tainted by Smith's unarticulated fears or apprehensions. *See Whitehead,* 263 F.3d at 722 (an evidentiary hearing unnecessary when jurors complained about newspaper publication of their names and addresses). Accordingly, Aleman fails to establish clearly established federal law required the trial judge to conduct a *voir dire* of the entire jury.

IV. Jury Security Measures (Claim II)

Aleman asserts his right to a fair and impartial jury was violated because the jury was subjected to heightened security. Specifically, Aleman complains: (1) sheriffs escorted the jury under heavy guard; (2) sheriff cars blocked the streets in front of the courtroom when jurors left; (3) the stairwell next to the courtroom was sealed off with police tape; and (4) "all activity in the courthouse came to a standstill when" Lowe and Almeida were escorted to the courthouse. The Illinois appellate court

determined the record did not support the assertion that security measures were imposed, except for placement of metal detectors outside the courtroom. The court held security measures were warranted due to the high profile nature of the case, and the record was devoid of evidence the jury was improperly influenced by security measures. Tr., Vol. I, Ex. E, at p. 8.

A federal court has a limited role in determining the extent of measures permitted in furtherance of a state's essential interest in courtroom security. *Hellum v. Warden, United States Penitentiary-Leavenworth,* 28 F.3d 903, 907 (8th Cir.1994). Further, a trial judge has wide discretion in determining necessary security measures in the courtroom. *United States v. Brooks,* 125 F.3d 484, 502 (7th Cir.1997). The record does not support Aleman's characterization of security measures, except for the presence of metal detectors. The use of metal detectors outside a courtroom does not inflict severe prejudice resulting in the denial of a constitutionally fair trial. *See Hellum,* 28 F.3d at 906 (upholding a state court's use of security measures, including handcuffs, leg irons, and armed guards in the courtroom). Nor is the escort of the jury by deputy sheriffs prejudicial. *See e.g. Holbrook v. Flynn,* 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (presence of four uniformed state troopers in the courtroom did not deny defendant a fair trial). Aleman fails to advance evidence the jury was influenced by security measures. *See Whitehead,* 263 F.3d at 722 (hearing is necessary only when defendant presents more than speculation about jury impartiality). Aleman's *habeas* claim challenging the trial judge's imposition of security measures lacks merit.

V. Jury Selection (Claim III)

Aleman argues he was denied a fair trial because the trial judge: (1) allowed jury selection to proceed until 9:30 p.m. without a dinner break; (2) refused to allow further *voir dire* of prospective juror Pauline Ghers; and (3) restricted defense counsel's *voir dire* of some jurors. The Illinois appellate court determined the trial judge conducted *voir dire* until 9:30 p.m. to maintain the court's "one day/one jury" policy. *Aleman,* 313 Ill.App.3d at 60, 246 Ill.Dec. 20, 729 N.E.2d at 28. The trial judge informed the jury the final decision to continue *voir dire* without a dinner break was the court's and not the parties'. *Id.;* Tr., Vol VI, at p. B-472. Aleman's claim is frivolous. The questioning of potential jurors without a dinner break until late evening is not an unreasonable application of any clearly established federal law.

Similarly, Aleman's contention the trial judge restricted his *voir dire* of Gehrs lacks merit. Gehrs did not serve on Aleman's jury. A criminal defendant does not have the right to a particular juror. *United States v. Polichemi,* 201 F.3d 858, 865 (7th Cir.2000). Aleman asserts the trial judge erred by failing to remove Gehrs for cause. Aleman must focus his *habeas* claim on the jurors who served, not prospective jurors who were removed by peremptory strikes. *Ross v. Oklahoma,* 487 U.S. 81, 86, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). If the jurors who served were impartial, the loss of a peremptory challenge is not a violation of the constitutional right to an impartial jury. *Id.* at 88, 108 S.Ct. 2273. Aleman's *habeas* claim involving Ghers fails.

Finally, Aleman argues the trial judge restricted his *voir dire* of some jurors. Aleman presents conclusory

arguments and fails to identify *voir dire* questions the trial judge restricted. Aleman fails to cite to the record. Indeed, Aleman's petition only identifies the trial judge's restriction of his questions about a juror's newspaper reading habits. The Illinois appellate court determined the trial judge inquired whether each venire member "had actual knowledge of the defendant" or "had heard or read anything about defendant or his case." *Aleman,* 313 Ill.App.3d at 60, 246 Ill.Dec. 20, 729 N.E.2d at 29. If a juror answered affirmatively, the trial judge then inquired further into the "source and specific nature of the information and its effect." *Id.* The trial judge's refusal to question the venire about newspaper subscriptions was not constitutional error nor did it violate clearly established federal law.[2] *See Mu'Min v. Virginia,* 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (trial judge's refusal to question prospective jurors about specific contents of available news reports did not violate right to an impartial jury).

VI. Trial Judge's Evidentiary Rulings (Claims IV-V)

"[S]tate court evidentiary rulings, because they are a matter of state law, will rarely serve as a proper basis for granting a writ of habeas corpus." *Haas v. Abrahamson,* 910 F.2d 384, 389 (7th Cir.1990); *see Gonzalez v. DeTella,* 127 F.3d 619, 621 (7th Cir.1997). *Habeas* relief is appropriate only if the trial court's evidentiary ruling denied the

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[2] In his petition, Aleman argues ineffective assistance of counsel under Claim III. The state responds that claim was procedurally defaulted. In his reply brief, Aleman withdraws the ineffective assistance of counsel claim.

defendant the right to a fundamentally fair trial. *Abrams v. Barnett,* 121 F.3d 1036, 1042 (7th Cir.1997). A defendant does not receive a fundamentally fair trial when the challenged rulings "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). "[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall v. Lonberger,* 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

A. Admission of Prior Crimes Evidence (Claim IV)

Aleman presents conclusory arguments about admission of prior crimes without citation to the record or case authority. Aleman lists the following purported constitutional errors: (1) admission of Judge Wilson's bribery; (2) Cooley's testimony "about First Ward politics, illegal gambling, fixed court cases, John D'Arco, Pat Marcy, the 'outfit,' Marco D'Amico, threats to judges, a second bribe to a witness in Aleman's original trial, and so on;" (3) Aleman's commission of a home invasion with Almeida; and (4) Judge Wilson's suicide. The court is not required to scour the 23-volume record searching for constitutional errors in Aleman's trial. The court will address Aleman's claim to the extent he identifies coherent and identifiable *habeas* claims in his petition.

Aleman argues the trial judge improperly admitted evidence Judge Wilson was bribed. The Illinois appellate court held the admission of Aleman's bribery of Judge Wilson was permitted to demonstrate Aleman's consciousness of

guilt; the 25-year delay in Aleman's trial; and Aleman's initial acquittal. *Aleman,* 313 Ill.App.3d at 65, 246 Ill.Dec. 20, 729 N.E.2d at 33. Under Illinois law, evidence of other crimes is admissible to demonstrate a defendant's consciousness of guilt. *People v. Hawkins,* 326 Ill.App.3d 992, 997, 260 Ill.Dec. 780, 762 N.E.2d 46, 50 (1st Dist.2002). As a matter of state law, the Illinois appellate court held the trial judge did not abuse his discretion by admitting evidence of other crimes. *Aleman,* 313 Ill.App.3d at 65, 729 N.E.2d at 32. Further, the Illinois appellate court noted the trial judge excluded all references to organized crime, but allowed references to the First Ward political organization because it was involved in the bribery conspiracy. *Id.* at 66, 729 N.E.2d at 33-34. Aleman asserts the trial judge should not have admitted evidence of a home invasion that Aleman and Almeida jointly committed. The Illinois appellate court determined the admission of that evidence was proper as rebuttal evidence. Aleman's theory of defense was that Petrocelli and Almeida committed Logan's murder. The Illinois appellate court observed:

> [D]efendant suggested to the jury that Petrocelli must have committed Logan's murder; he then bolstered this theory by portraying Petrocelli and Almeida as criminal cohorts. Responding, the State adduced evidence that defendant and Almeida also were cohorts, thereby rebutting the inference that only Almeida and Petrocelli, not Almeida and defendant committed Logan's murder. Accordingly, no error occurred.

Tr., Vol. 1, Ex. E. at p. 10.

Finally, Aleman contests the admission of Judge Wilson's suicide. The trial judge initially ruled this evidence was inadmissible. During Aleman's cross-examination of

Lowe, Lowe made a vague, unexpected reference to a judge who committed suicide. Judge Wilson was not mentioned by name. *Id.* at 12. Aleman failed to object. The Illinois appellate court found no prejudicial error.

Aleman's claims fail to demonstrate he was subjected to a fundamentally unfair trial. The trial judge's evidentiary rulings are matters of state law; the rulings were affirmed. *See e.g. Walker v. Carter,* No. 97 C 8345, 2000 WL 263702, at *6 (N.D.Ill. Feb.28, 2000) (refusing to disturb state court rulings on admissibility of hearsay evidence on *habeas* review). This court's review is limited to determining whether Aleman was afforded a fundamentally unfair trial that amounts to a due process violation. Aleman's arguments contest the wisdom of the state court's evidentiary rulings. Aleman cloaks the state court rulings as federal due process violations. However, on *habeas* review, Aleman must establish prejudice that gives rise to the likelihood that an innocent person was convicted. *See Howard v. O'Sullivan,* 185 F.3d 721, 723-24 (7th Cir.1999); *see also Fleming v. Detella,* No. 97 C 2997, 2001 WL 127644, at *5 (N.D.Ill. Feb.14, 2001) (admission of other crimes evidence, in accordance with Illinois law, was not grounds for *habeas* relief). Aleman makes no claim he is innocent of the murder charge, nor does he point to record evidence suggesting that conclusion. The trial judge's admission of prior crimes evidence, in accordance with Illinois law, did not result in a fundamentally unfair trial. On *habeas* review, the court does not balance the probative value of the evidence against unfair prejudice; that analysis is deferred to the state court. *Anderson v. Sternes,* 243 F.3d 1049, 1055 (7th Cir.2001). Further, Lowe's vague, passing reference to a judge who committed suicide is immaterial to Aleman's conviction for Logan's murder.

Aleman does not advance relevant Supreme Court precedent that demonstrates he was subjected to a fundamentally unfair trial. Consequently, Aleman fails to establish the state court unreasonably applied clearly established federal law.

B. Admission of Judge Wilson's Factual Findings (Claim V)

Aleman sought to introduce Judge Wilson's factual findings from the 1977 trial. The trial judge agreed to admit Judge Wilson's findings, but noted evidence about Judge Wilson's suicide would be admissible to rebut Aleman's claim that Judge Wilson was not bribed. The trial judge determined Aleman would open the door to Judge Wilson's suicide if he argued Judge Wilson was not bribed and his acquittal at the first trial was legitimate. Tr., Vol. I., Ex. E at p. 17. As a result, Aleman refrained from introducing Judge Wilson's factual findings. The Illinois appellate court found no error in the trial judge's ruling. Aleman fails to establish the state court's decision violated clearly established federal law. Aleman advances *Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) and *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). *Rock* and *Washington* do not concern analogous facts, and refer generally to a defendant's right to present a defense. However, "the defendant's right to present evidence is not absolute, and the exclusion of even relevant evidence does not automatically create a Due Process violation." *Morgan v. Krenke,* 232 F.3d 562, 569 (7th Cir.2000). Aleman now argues the trial judge's ruling was unwise. The Illinois appellate court affirmed the trial judge's ruling; it is not a federal court's role to review state evidentiary decisions. *Id.*

VII. Exclusion of Dr. Herbert MacDonnell's Expert Testimony (Claim VI)

Aleman asserts the trial court erred when it excluded a portion of Dr. Herbert MacDonnell's testimony. Dr. MacDonnell was Aleman's designated expert, a criminologist and expert in crime scene reconstruction. Dr. MacDonnell testified to the angle and tragectory [sic] of the shooting, and that Logan's neck wound was not caused by a shotgun but a .45 caliber handgun. Dr. MacDonnell was also offered to dispute the state expert's characterization of Logan's second shotgun wound. Dr. MacDonnell was not permitted to opine that an individual hit by a shotgun bullet would not "fly backwards." Tr., Vol. I, Ex. E at p. 15. The trial judge ruled Aleman failed to disclose the last opinion to the state until Dr. MacDonnell was called as an expert witness at trial. Tr., Vol. XI, at p. F-26. The trial judge recognized the state would be unduly prejudiced by the admission of the undisclosed opinion.

Aleman contends he was denied the right to call witnesses in his defense and due process of law under the Sixth and Fourteenth Amendments. The Illinois appellate court affirmed the limited exclusion of Dr. MacDonnell's testimony because Aleman failed to comply with Illinois discovery rules on expert testimony disclosure. *See* Tr., Vol. I, Ex. E., at p. 15. Aleman argues he did not violate Illinois discovery rules. The Illinois appellate court rejected that argument. Aleman's claim based on state law grounds is improper in a federal *habeas* petition. *See e.g. Pertz v. Carter,* No. 97 C 2066, 1997 WL 422273, at *5 (N.D.Ill. Jan.29, 1998). Further, the trial court's exclusion of the undisclosed portion of Dr. MacDonald's testimony did not result in a fundamentally unfair trial. The exclusion of evidence does not violate the due process clause unless "it

offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff,* 518 U.S. 37, 43, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (quoting *Patterson v. New York,* 432 U.S. 197, 201-202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). That standard has not been met.

VIII. Prosecutorial Misconduct (Claim VII)

To warrant *habeas* relief, a prosecutor's actions must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). When assessing whether a prosecutor's statement deprived a defendant of a fair trial, the court must examine five factors: (1) the nature and seriousness of the prosecutorial misconduct; (2) whether the prosecutor's statement was invited by defense counsel's conduct; (3) whether the trial court's instructions to the jury were adequate; (4) whether the defense was able to counter the improper arguments through rebuttal; and (5) the weight of the evidence against the defendant. *United States v. Butler,* 71 F.3d 243, 254 (7th Cir.1995).

The Fifth Amendment to the Constitution guarantees a criminal defendant the right to refuse to testify in his defense. *Freeman v. Lane,* 962 F.2d 1252, 1260-61 (7th Cir.1992). As a corollary to that right, the Fifth Amendment prohibits a prosecutor from referring to a defendant's refusal to testify. *Griffin v. California,* 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106, (1965). Thus, a prosecutor cannot invite the jury to infer guilt from a defendant's silence. *Id.* at 615, 85 S.Ct. 1229. Nevertheless, during closing argument, the prosecutor commented: "[Defendant]

is the only one in this room who didn't come on this witness stand and talk about accepting responsibility. And again, the defendant does not have to testify. But those other witnesses told you about their accepting of their responsibility." Tr., Vol. XIV, at p. H-77. In addition, the prosecutor theorized about the possibility of a third shot, but stated only defendant "knows." *Id.* at p. H-47. The Illinois appellate court determined that "[t]aken as a whole, those comments reflect a calculated attempt to draw attention to defendant's invocation of his right of refusal to testify. This line of argument had the greatest potential for prejudicing the defense and for denying defendant a fair trial." *Aleman,* 313 Ill.App.3d at 67, 246 Ill.Dec. 20, 729 N.E.2d at 34. The Illinois appellate court also found the prosecutor improperly drew a connection between Aleman and an organized crime syndicate by calling Aleman a "hitman," in circumvention of the trial judge's order. *Id.* Finally, the Illinois appellate court held the prosecutor exceeded the bounds of proper argument by his negative portrayal of defense counsel: "But what [defendant's] attorneys have done is not unlike what was done in 1977 when it went to trial. Different form, different style. But they don't want you to follow the law." *Id.*

The Illinois appellate court noted the trial judge sustained defense counsel's objections to the prosecutor's improper statements, and provided numerous curative instructions. During *voir dire,* the court instructed the venire Aleman was innocent unless the state proved his guilt beyond a reasonable doubt, and that he need not testify. After the jury was selected and sworn, the court again advised the jurors of Aleman's right not to testify. In closing argument, the prosecutor noted Aleman's right not

to testify. Finally, the court instructed the jury of Aleman's presumption of innocence:

> The defendant is presumed to be innocent of the charge against him, and this presumption remains with him throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that he is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the state throughout the case. The defendant is not required to prove his innocence.

Aleman, 313 Ill.App.3d at 68, 729 N.E.2d at 34; Tr., Vol. XIV, at p. H-177. The trial court instructed the jury: "The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." *Id.* at H-178. The Illinois appellate court held the curative effect of these repeated instructions prevented any prejudice to Aleman and he was not denied a fair trial.

To warrant *habeas* relief, Aleman must establish the Illinois appellate court unreasonably applied clearly established federal law. The Illinois appellate court correctly balanced competing factors to determine if Aleman suffered prejudice. *See Aliwoli v. Carter,* 225 F.3d 826 (7th Cir.2000) (trial judge's instructions can prevent undue prejudice to defendant). The prosecutor's comments during closing argument were clearly improper. However, the Illinois appellate court determined the curative effect of the trial judge's instructions adequately protected his right to a fair trial in view of the manifest weight of the evidence. A federal court's role in *habeas* review is limited. *See Sanchez v. Gilmore,* 189 F.3d 619, 623 (7th Cir.1999)

("the fact that we may think certain things could have been handled better by the state trial judge or by the state prosecuting attorney or by a state reviewing court means very little"). A state court's decision must stand "if it is one of several equally plausible outcomes." *Hall v. Washington,* 106 F.3d 742, 748-49 (7th Cir.1997). The Illinois appellate court's determination the trial judge's curative instructions and strength of the evidence against Aleman prevented any prejudice is a reasonable application of federal law. *See United States v. Andreas,* 216 F.3d 645, 673-76 (7th Cir.2000) (curative instruction and strength of evidence may result in harmless error of prosecutor's misstatements about defendant's refusal to testify).

The state presented the testimony of Lowe and Almeida, both of whom clearly implicated Aleman in Logan's murder. *See Whitehead,* 263 F.3d at 729 (manifest weight of the evidence prevented *habeas* relief where prosecutor made improper comments); *Rodriguez v. Peters,* 63 F.3d 546, 562 (7th Cir.1995) (overwhelming evidence prevented prejudice to defendant by prosecutorial misconduct). Alemeida detailed Aleman's participation in the murder; Lowe witnessed the murder and identified Aleman as the shooter. Thus, it was reasonable for the Illinois appellate court to conclude the prosecutor's remark about Aleman not taking responsibility did not tip the scales in favor of a conviction. *See Bell v. Cone,* ___ U.S. ___, ___, 122 S.Ct. 1843, 1849-50, 152 L.Ed.2d 914 (2002) (state court decision must be objectively unreasonable to grant habeas relief under § 2254(d)(1)); *Hough v. Anderson,* 272 F.3d 878, 890 (7th Cir.2001) (an incorrect application of federal law is not necessarily unreasonable). Accordingly, Claim VII fails.

IX. Judicial Bias (Claim VIII)

Aleman argues he was deprived of due process because one of the prosecutors, Assistant State's Attorney Patrick Quinn, is currently a member of the Illinois appellate court. Although Justice Quinn recused himself from the panel that heard Aleman's direct appeal, Aleman contends Justice Quinn participated on a panel before his case was called at oral argument. When Aleman argued his case, one justice was unable to participate. Two justices heard the appeal, but the appellate court's decision was issued by a three-judge panel. *See Aleman,* 313 Ill.App.3d at 53, 246 Ill.Dec. 20, 729 N.E.2d at 24. In short, Aleman's argument amounts to mere speculation about a conspiracy among the justices to permit Justice Quinn to influence its decision. *See Del Vecchio v. Dep't. of Corr.,* 31 F.3d 1363, 1373 (7th Cir.1994) (speculation cannot support claim of judicial bias). Further, Aleman cannot demonstrate actual bias or even an appearance of bias because Justice Quinn recused himself from consideration of Aleman's direct appeal. The Illinois appellate court summarily denied Aleman's bias claim in his petition for rehearing. Claim VIII fails.

X. Evidentiary Hearing Requests in § 2254 petition

Finally, Aleman requests an evidentiary hearing to develop the factual record for every claim asserted in his *habeas* petition. Aleman fails to discuss § 2254(e)'s requirements. This court cannot grant an evidentiary hearing unless Aleman demonstrates his claim relies on "(i) a new rule of constitutional law . . . that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of

due diligence." 28 U.S.C. § 2254(e)(2). Aleman does not advance a new rule of constitutional law previously unavailable in his § 2254 petition. Further, a "federal court's ability to hold an evidentiary hearing in order to supplement the record when the petitioner has failed to develop the factual basis of a claim in State court proceedings is severely circumscribed." *Boyko v. Al C. Parke,* 259 F.3d 781, 790 (7th Cir.2001). A federal court may hold an evidentiary hearing if the petitioner points to facts sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would find him guilty of the underlying offense. 28 U.S.C. § 2254(e)(2)(B). Aleman fails to advance facts that, if proven, could rebut the state court's factual findings by clear and convincing evidence. *See Mendiola v. Schomig,* 224 F.3d 589, 592 (7th Cir.2000). Accordingly, an evidentiary hearing is unwarranted.

CONCLUSION

The petition for a writ of *habeas corpus* under 28 U.S.C. § 2254 is denied.

729 N.E.2d 20

APPENDIX D

Appellate Court of Illinois,
First District, Fifth Division.

**The PEOPLE of the State of Illinois,
Plaintiff-Appellee,
v.
Harry ALEMAN, Defendant-Appellant.**

No. 1-98-0047.

March 31, 2000.
Rehearing Denied May 25, 2000.

Marc W. Martin; Alexander Salerno, Chicago; and Kevin McNally and Margaret O'Donnell, Frankfort, KY, of counsel, for Appellant.

Richard A. Devine, State's Attorney, Chicago (Renee Goldfarb, James E. Fitzgerald and John Robert Blakey, of counsel), for Appellee.

Justice HARTMAN delivered the opinion of the court:

A jury found defendant Harry Aleman guilty of first-degree murder and he was subsequently sentenced to a term of 100 to 300 years' imprisonment.[1] Defendant appeals from his second

[1] On September 27, 1972, Billy Logan was shot to death on West Walton Street in Chicago. In December 1976, defendant was indicted for Logan's murder. Following a bench trial before Judge Frank Wilson in May of 1977, defendant was acquitted. Several years thereafter, federal investigators uncovered evidence that Judge Wilson had accepted a $10,000 bribe to find defendant not guilty. In February 1990, two months after Judge Wilson was informed by the FBI of the investigation into bribery, he committed suicide. In December 1993, defendant

(Continued on following page)

trial; among errors he identifies are: (1) errors occurring during *voir dire* deprived him of a fair trial; (2) the court erred in refusing to question individual jurors as to possible conversations with another juror; (3) the court erred in imposing certain security measures in the courtroom; (4) he was denied a fair trial by the admission of "other crimes" evidence regarding judicial bribery; (5) he was denied a fair trial by the State's alleged references to organized crime; (6) he was denied a fair trial in the admission of impeachment evidence indicating that he had committed a home invasion with an accomplice; (7) he was denied a fair trial where his attorney, in opening statement, referred to the testimony of a possible State witness who did not testify; (8) he was denied a fair trial where a witness testified that the judge in defendant's previous murder trial committed suicide; (9) alleged prosecutorial misconduct at argument denied him a fair trial; (10) the court erred in refusing to grant his defense counsel a two-week continuance; (11) the court abused its discretion in limiting his cross-examination of State witnesses; (12) the court abused its discretion in curtailing the testimony of a defense expert; (13) the court erred in finding that the previous judge's suicide was admissible as rebuttal evidence if defendant chose to seek admission of the previous judge's specific findings; (14) he

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was again indicted for Logan's murder. Although he sought to dismiss the indictment through the application of double jeopardy principles, the circuit court held that double jeopardy did not bar re-indictment or re-prosecution. This court affirmed (see *People v. Aleman*, 281 Ill.App.3d 991, 217 Ill.Dec. 526, 667 N.E.2d 615 (1996)); accordingly, defendant was retried, from which result the present appeal is taken.

> was denied due process as a result of alleged error occurring at his suppression hearing; and (15) issues relating to re-indictment and re-prosecution (double jeopardy, speedy trial) must be reconsidered in light of "new evidence." Issues (1), (2), (4), (5) and (9) will be considered in this opinion; issues (3), (6) through (8), and (10) through (15) will be determined in a separate Supreme Court Rule 23 order disseminated contemporaneously.

In the case *sub judice,* the 23-volume record reflects that on retrial, the State presented evidence from several witnesses regarding Logan's murder. Logan lived with his sister, Betty Romo, and another sister. On September 27, 1972, Logan left for work at 11 p.m. Shortly after, Romo heard three loud noises or shots. Running outside, she discovered Logan, bleeding from two fatal shotgun wounds. Logan had been divorced from defendant's second cousin, Phyllis Napoles. They were engaged in a custody battle. Previously, he had been arrested for her assault and battery.

Bobby Lowe, Logan's neighbor, testified that on September 27, while walking his dog, he observed a vehicle parked across the street with its engine running and Logan walking to his parked automobile. As Lowe approached Logan to speak with him, the other vehicle pulled up. Lowe heard two loud noises and saw Logan fly backwards. Defendant exited the passenger side of the vehicle, approached Logan with a gun-like object in his hand, which he pointed at the fallen Logan. Lowe stared at defendant for four or five seconds, standing three or four feet away, then turned and ran. While running, he heard another loud noise and heard the vehicle drive away. In 1972, he picked out defendant's photograph and

again, in 1976, he identified defendant as Logan's shooter for police. As a result of witnessing the shooting, Lowe was forced to quit his job and was relocated. He received money from the State during both trials. Lowe had incurred many debts, which he paid in part with money received from the State.

Louis Almeida, a career criminal who had grown up in the same neighborhood as defendant, testified for the State. In March of 1975, while driving through Ohio on their way to "kill somebody" for $10,000 in Pennsylvania, he and Joe Neri were stopped by Ohio police and arrested for possession of weapons and a silencer. Almeida provided police with information about his various criminal activities, including armed robberies, vehicle thefts, and bombings. Later, he reported details of Logan's murder identifying himself as the driver and defendant as the shooter. In exchange, Almeida was given immunity from prosecution for Logan's murder.

According to Almeida, in August of 1972, defendant discussed his plan to kill Logan and gave him two license plate numbers and Logan's home and work addresses, writing "Death to Billy" on the same piece of paper. Almeida then trailed Logan to learn his habits and schedule.

On the evening of September 27, 1972, defendant, armed with a shotgun and a .45 caliber handgun, was driven by Almeida to Logan's block, where he parked. Almeida observed a man walking a dog. At 11:15 p.m., he saw Logan. Almeida drove the automobile near Logan. Defendant called to Logan. Logan walked toward them. Defendant shot him twice with a 12-gauge shotgun. Logan "flew back" and began crawling and yelling for a doctor.

Defendant stepped half-way out of the car, but "shut the door on the car and [said], let's go, he's gone."

The State then presented evidence regarding defendant's 1977 trial for Logan's murder, which resulted in acquittal. Robert Cooley, a former Chicago Police Officer and attorney during the late 1970's, testified that while he was a police officer, and also later when he practiced criminal law, he often bribed judges, clerks and sheriffs. While an attorney, Cooley visited the "Counselor's Row" restaurant, which members of Chicago's "First Ward" political organization frequented.

In February 1977, Cooley met with First Ward secretary Pat Marcy and ward committeeman John D'Arco, Sr. Marcy told Cooley of defendant's "murder case" and asked him if he knew of a judge who could "handle it," or fix the case. Cooley described Judge Wilson as a "very close" friend but a "drinker" who might need the money.[2] Cooley approached Wilson, who initially informed Cooley that he had been "SOJ'd"[3] and was unable to help. Cooley later told Wilson the case against defendant was weak, it could be handled very easily, and that Cooley would pay him $10,000 for an acquittal should the case be reassigned to Wilson. Wilson later agreed to "handle" the case if Tom Maloney, then defendant's attorney, withdrew his SOJ motion and withdrew from the case; he also asked that Cooley not represent defendant, to avoid any appearance

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[2] Cooley also testified that Judge Wilson was "very straight" and a "state-minded" judge, who, to his knowledge, had never accepted a bribe.

[3] Referring to a motion for substitution of judge.

of impropriety. Cooley then gave $2,500 to Wilson, the remaining $7,500 to be paid when the trial was over.

After paying Judge Wilson, Cooley met with defendant and another man, Marco D'Amico, assuring them both that the case had been fixed and that Wilson would acquit defendant. Cooley told them of Wilson's conditions. It was agreed that Frank Whalen, a former Chicago attorney living in Florida, would represent defendant, and Cooley met Whalen at the Bismark Hotel in April 1977. There, Cooley told Whalen that Wilson was going to "throw the case out," but wanted no contact with Whalen. Cooley would act as middleman; Whalen agreed.

Cooley again met with defendant, who told him that Maloney had "come up with an alibi" for the night of Logan's murder, that defendant had been hitting golf balls with three or four friends. Defendant also stated that "somebody" had "gotten to" police investigators and some of the police reports would not "make it" to court. Cooley and defendant met again. Butch Petrocelli was present. Defendant informed Cooley that a female witness to the Logan murder had accepted $10,000 to testify that defendant had not done the shooting. Cooley later informed Judge Wilson about this witness, who thought that was a good idea. Cooley did not, however, inform Wilson of the $10,000 witness payment. Cooley then met Whalen in Florida a week before the trial and again assured him that Wilson would throw the case out.

On the second day of the 1977 trial, Cooley met Judge Wilson, who was very upset because the case was not as weak as represented and Whalen was not doing a good job. Cooley warned Wilson to follow through with the deal. The

next day, Cooley told Marcy of this development; Marcy responded that Wilson had better do as agreed.

Cooley again met with Judge Wilson. Wilson had discovered that the female witness was receiving $10,000 for testifying falsely. He complained of receiving $10,000 although he was a "full circuit judge," and requested more bribe money. Cooley told Wilson he would see what he could do, but to fulfil his part of the deal or both would be in a great deal of trouble. Cooley then met with Marcy again, addressing Wilson's demand; Marcy refused additional payment.

On May 24, 1977, Judge Wilson acquitted defendant of Logan's murder. Marcy then gave Cooley two envelopes; one contained $7,500 for Wilson and the other held $3,000 for Cooley. That evening, Cooley met Wilson at a restaurant. In the men's room, Cooley gave Wilson the remaining $7,500 of the bribe. Wilson said he was a "broken man" and that Cooley had "destroyed" and " killed" him.

A few weeks later, defendant, while with Petrocelli, thanked Cooley, telling him that he had done a great job, and asked Cooley for a few of his business cards so that he could send him more clients.

On cross-examination, Cooley testified, among other things, that since 1986 he had been paid $3,400 per month by the government. He admitted having a heavy gambling habit and cheating on his taxes. The State rested.

Defendant presented the testimony of several witnesses, including William Dietrich, Billy Logan's nephew, and Stanley Ryba, Logan's neighbor, to challenge Lowe's account of the shooting. Dietrich, who was living with Logan on September 27, 1972, recalled being asleep on the

front porch at 11 p.m. He awoke to hear someone say, "hey, Bill, come here." Immediately hearing two gunshots, he looked outside and saw Logan on his knees, falling backwards. He noticed a large vehicle, but no one else on the street at that time. Ryba, a neighbor of Logan's, testified that he was watching television in his home six houses away. At 11 p.m., he heard a gunshot, looked out his window and saw a car double-parked on the street and a man "down" nearby. No one else was in the area. Guido Calcagno, Almeida's life-long friend, testified for defendant that he had known Almeida since they were both children. Almeida was "not very truthful" with a "tendency to lie about everything." Several police officers who had investigated Logan's murder testified that Lowe initially was "reticent" and fearful who, at first, only identified the occupants of the automobile as two white males.

Logan's son, William Jr., and Phyllis Napoles, defendant's second cousin and Logan's ex-wife, also testified for defendant. They suggested that Petrocelli, not defendant, shot Logan. Napoles described Logan as an abusive drunk and characterized her relationship with Logan as "tumultuous." After her divorce from Logan in 1967, she had a relationship with Petrocelli, a "very violent" man with a "dark side." In March 1972, Logan, in a drunken state, kicked the door of her home and threatened her. Petrocelli, who was present, began arguing with Logan and a violent physical confrontation ensued, during which Petrocelli threatened to kill Logan. Logan's son, William Jr., present during this fight, testified that he heard Petrocelli tell Logan that "he'll take him out."

The defense also presented the testimony of Ed Whalen, Jr., Frank Whalen's nephew, in questioning Cooley's account of Judge Wilson's bribe. Whalen, Jr. often

helped his uncle with cases, including defendant's 1977 murder trial. His uncle, who had partially retired to Florida, stayed in a condominium in the Hancock Building, not the Bismark Hotel, whenever he came to Chicago. Whalen, Jr. never came into contact with Cooley during the 1977 trial. The trial was legitimate and not fixed. Neither Frank Whalen nor defendant ever indicated to Whalen, Jr. that the case had been predetermined.

The jury found defendant guilty and he was sentenced to a prison term of not less than 100 and not more than 300 years.

I

Defendant initially raises several issues concerning the selection of the jury, claiming he was denied a fair trial.

A

As a result of defendant's concern about pre-trial publicity, the circuit court employed a two-step process to select the jury, first, individually questioning members of the venire (outside the presence of others) as to their knowledge about the case or defendant. Those members who had been exposed to pre-trial publicity were questioned further as to their knowledge of the facts and the effect, if any, of the exposure. This "special," individual questioning by the court occurred outside the courtroom with only the attorneys and defendant present. After excusing for cause those venire members who had knowledge of the case or defendant, the court then conducted the "typical" *voir dire*: twelve venire members were called to the jury box and then questioned by the court and the

attorneys, in the presence of the entire venire; those that were excused were then replaced by other members of the venire; and the process continued until 12 jurors were empaneled. Defendant acquiesced in this two-step process, but now complains about the jury selection "atmosphere," contending it was "publicity-tainted."

Of the approximately 70 venire members, only 16 indicated that they had heard about the case or defendant. Of those, seven were excused for cause having expressed prejudice against defendant. Also excused were four venire members who had heard about the case or defendant due to reasons not involving pre-trial publicity.

Defendant also portrays jury selection as rife with gossip and murmurs, pointing to an incident involving a venire member, Neva O'Laughlin, who was excused by the court because of her expressed inability to be impartial as a result of exposure to pre-trial publicity. After excusing her for cause, the court was informed by a deputy that O'Laughlin, prior to jury selection, had been seen with five or six other venire members discussing defendant's case and his affiliation with the "mob." As a cautionary measure, the deputy then pointed out to the court, as the venire members were questioned by the court, the individual venire members who had been seen near O'Laughlin. Those venire members did not serve on defendant's jury. Accordingly, defendant's assertion that the entire venire was somehow poisoned by pre-trial publicity is refuted by the record.

B

Defendant also claims that he was denied a fair trial because the circuit court refused him the right to question

individually the venire members, during the first phase of jury selection, regarding pre-trial publicity, and failed to strike for cause four venire members. He also insists that the court should have conducted "supplemental" *voir dire* of those four venire members.

The right to an impartial jury is fundamental to due process and any infringement of that right requires reversal. *People v. Cole,* 54 Ill.2d 401, 411, 298 N.E.2d 705 (1973). One purpose of *voir dire* is to filter out and eliminate prospective jurors who are not impartial. *People v. Peeples,* 155 Ill.2d 422, 463, 186 Ill.Dec. 341, 616 N.E.2d 294 (1993); *People v. Carroll,* 260 Ill.App.3d 319, 342,, 197 Ill.Dec. 696, 631 N.E.2d 1155 (1992). Impartiality is not a technical concept, however, and a circuit court's determination of whether a prospective juror is biased is entitled to deference, given its superior position to gauge the meaning of responses to questions posed. *People v. Pitsonbarger,* 142 Ill.2d 353, 388, 154 Ill.Dec. 562, 568 N.E.2d 783 (1990). Accordingly, unless against the manifest weight of the evidence, a court's determination, whether to strike a potential juror for cause, will be upheld. *Peeples,* 155 Ill.2d at 463, 186 Ill.Dec. 341, 616 N.E.2d 294.

Defendant points to four members of the venire whom the circuit court refused to strike for cause; however, none of those venire members sat on his jury. In fact, three of them never were called and questioned during the second, "typical," phase of jury selection. Only one was called to the jury box for the typical *voir dire* and questioned; after defense questioning, defendant used one of his peremptory challenges to excuse her. Given the fact that none of the complained-of prospective jurors sat on defendant's jury, his assertion of prejudicial error is without foundation.

The circuit court retains "broad discretion" in conducting *voir dire* and only where the court's procedures and decisions have frustrated the purpose of *voir dire* will an abuse of discretion be found. *People v. Hope,* 168 Ill.2d 1, 30, 212 Ill.Dec. 909, 658 N.E.2d 391 (1995); *People v. Howard,* 147 Ill.2d 103, 134, 167 Ill.Dec. 914, 588 N.E.2d 1044 (1991). Here, the court went to extraordinary, if somewhat unorthodox, lengths to ensure that an impartial and fair jury was empaneled. The court's actions were undertaken for the sole purpose of guaranteeing an orderly and fair tribunal, which was accomplished.

C

Defendant also contends that the circuit court's refusal to ask the individual venire members about newspaper subscriptions denied him a fair trial. A review of the record, however, indicates that the court's questions thoroughly addressed any potential prejudice due to exposure to pre-trial publicity. Any questions regarding mere subscription information would have been cumulative and irrelevant.

The purpose of the special publicity *voir dire* was to ferret out those venire members who had actual knowledge of defendant or the case and to determine the effect, if any, of that knowledge on the individual. Each venire member was asked if he or she had heard or read anything about defendant or his case before arriving at, or since entering, court. When this first inquiry was answered affirmatively, the court then questioned the individual venire member as to the source and specific nature of the information and its effect.

Accordingly, defendant's suggestion that the circuit court abused its discretion in failing to ask generally about subscriptions does not persuade. Such an inquiry would not have yielded any additional, cogent information regarding exposure to publicity.

D

Defendant also insists that he was denied a fair trial where the circuit court failed to give the venire a dinner break after a lengthy day of jury selection to the expressed dissatisfaction of the venire, which, he claims, alienated and enraged the jury.

The circuit court conducted *voir dire* over an admittedly lengthy period. From the early afternoon until nearly 9 p.m., the court and attorneys questioned the venire. The court's decision was expressly made to accommodate the "one day/one jury" promise initially made to the venire members: "my fear is that if we don't move forward with the regular *voir dire* we are going to get a lot of angry people and we will lose much of what we accomplished today." To deflect any animosity toward the attorneys, the court also advised the empaneled jurors that it was the court's decision, not the attorneys', to work late for which the court took responsibility. Moreover, given that the procedures instituted by the circuit court were undertaken in response to defense fears regarding pre-trial publicity, it cannot be said the court abused its discretion. *Hope,* 168 Ill.2d at 30, 212 Ill.Dec. 909, 658 N.E.2d 391.

E

Defendant next argues that he was denied a fair trial because the circuit court "bridled" defense questions to the

jury and "constantly" sustained the State's objections to defense questions. The State did object to defense questioning of venire members; however, those questions were over-broad and nonspecific. The State's objections were appropriate.

Prior to *voir dire*, the circuit court warned the defense several times that questions dealing with the evidence in the case or involving the venire members' "feelings" about issues in the case were inappropriate. Nevertheless, the defense, on numerous occasions, queried the venire members as to their "feelings" about various principles of law and attempted to suggest to the jury its theory of the case. The court did not forestall proper inquiry, but merely prevented the defense from asking either legitimate questions in an inappropriate manner or improper questions. See 166 Ill.2d R. 431. Accordingly, the court did not abuse its discretion in sustaining objections to clearly inappropriately-worded defense questions. See *People v. Zehr,* 103 Ill.2d 472, 83 Ill.Dec. 128, 469 N.E.2d 1062 (1984); *People v. Williams,* 159 Ill.App.3d 527, 532, 111 Ill.Dec. 131, 512 N.E.2d 35 (1987).

F

Defendant also claims that the circuit court "failed to allow attorney-questioning of prospective alternate jurors" in violation of Rule 431(a) (166 Ill.2d R. 431(a)). Defendant's argument, however, is waived due to his failure to object at trial.

Before selection of the alternates, the circuit court indicated that the court, not the attorneys, would ask the questions. Defendant did not object to this procedure. In any event, defendant has failed to show how the court

abused its discretion in appropriately questioning alternate jurors. See *People v. Terrell,* 185 Ill.2d 467, 484, 236 Ill.Dec. 723, 708 N.E.2d 309 (1998).

G

Defendant's final issue in this regard is that the circuit court erred in refusing to require the State to explain its use of peremptory challenges directed at two African-Americans and one Hispanic venire member.

In raising a *Batson* claim, a defendant must first prove that the prosecutor exercised peremptory challenges to remove venire persons of a cognizable racial group and that the relevant circumstances create an inference of discrimination in the exclusion based on race. *People v. Evans,* 125 Ill.2d 50, 61-67, 125 Ill.Dec. 790, 530 N.E.2d 1360 (1988); see also *People v. Evans,* 186 Ill.2d 83, 91, 237 Ill.Dec. 118, 708 N.E.2d 1158 (1999). Relevant circumstances may include: a pattern of strikes; the prosecutor's questions during *voir dire*; a disproportionate use of peremptory challenges; whether the excluded members were a heterogeneous group sharing race as the only common characteristic; the level of representation in the venire as compared to the jury; and the race of the defendant, victim and witnesses. *People v. Edwards,* 144 Ill.2d 108, 153, 161 Ill.Dec. 788, 579 N.E.2d 336 (1991). Only if a court finds that a defendant has met a *prima facie* showing will the court require the State to provide race-neutral reasons for the exercise of its peremptory challenges. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *People v. Fort,* 248 Ill.App.3d 301, 307-08, 187 Ill.Dec. 854, 618 N.E.2d 445 (1993).

Here, immediately after the State exercised its first three peremptory challenges, defendant raised his *Batson* claim, arguing that two of the State's challenges were directed at a "black female" and a "Hispanic male." When asked by the circuit court how these two challenges evidenced a pattern of strikes, defense counsel responded, "I don't think there needs to be a pattern of strikes." Defense counsel's misconception replayed itself when, after the State exercised two more peremptory challenges, defense counsel was unable to show a pattern, but only pointed to the State's striking of two black males.

The circuit court correctly found that defendant did not meet his burden of proving a *prima facie* case of purposeful discrimination. Beyond the absence of any pattern of strikes, the record reflects no indication of racist motives in the prosecutor's questions and no indication of a disproportionate use of challenges against a specific racial group. See *People v. Harris,* 164 Ill.2d 322, 344, 207 Ill.Dec. 400, 647 N.E.2d 893 (1994); *People v. McDonald,* 249 Ill.App.3d 702, 188 Ill.Dec. 865, 619 N.E.2d 229 (1993). The record is silent as to the composition of the venire or the jury and the race of the witnesses. Accordingly, his *Batson* claim is unsubstantiated.

Defendant concludes that the cumulative effect of the alleged errors occurring during jury selection deprived him of his constitutional rights. None of his claims have individual merit and, therefore, cannot combine to establish prejudicial error. See *People v. Albanese,* 102 Ill.2d 54, 82-83, 79 Ill.Dec. 608, 464 N.E.2d 206 (1984).

II

Defendant next claims that the circuit court erred in refusing to question individual jurors as to possible conversations with another juror.

On the second day of trial, after several witnesses had testified, the circuit court was informed that a juror had communicated with an assistant state's attorney (ASA) who was not involved in the case. Outside the presence of the jury, the court then questioned the juror, Brenda Smith, who explained that she had telephoned the ASA because she "was just worried about this case and where it's going and what could happen to [her] as well as * * * family members [and] just wanted to know if there was anything [she] could do to take [herself] out of it." The court determined that the ASA had refused to speak with Juror Smith and had told her "to make the best of it"; nevertheless, the court inquired further as to whether Juror Smith had "discussed [her concerns] with anybody else." Although Smith initially answered "no," when asked whether she had "discussed any of this with your fellow jurors," Smith later answered, "Yeah. I mean, I guess – yeah. There have been times when we have said things or whatever when we walk in and we look at each other and kind of, you know, wow, that was, you know – ."

The circuit court then interrupted Juror Smith, stating "That's not a discussion" to which Smith agreed: "No I guess not then." A lengthy colloquy then took place between the court and Smith, in which the court specifically questioned Smith regarding whether she had expressed her fears and concerns to the other jurors. In her answers, Smith vacillated, claiming that she and the other jurors "lightheartedly" spoke about being around after the

trial to exchange Christmas cards. Smith nevertheless acknowledged that she did "not really [have] conversations" about her fears, she only discussed her trouble "sleeping at night." The circuit court then asked Juror Smith if her feelings would prevent her from deciding the case based upon the evidence and the law; her response was equivocal. Defendant asked the court to remove Juror Smith and also moved for a mistrial, contending that the entire jury had been "poisoned." Defendant also suggested that the court question the other jurors as to possible conversations with Juror Smith. The court refused, finding that Juror Smith had not expressed or verbalized her concerns to the other jurors. The court did, however, excuse Juror Smith from defendant's jury.

As a rule, it is improper for jurors to discuss among themselves the case or any subject connected to the case until all the evidence has been presented and after receiving final instructions. *People v. Cloutier,* 178 Ill.2d 141, 160-61, 227 Ill.Dec. 448, 687 N.E.2d 930 (1997). Nevertheless, "under certain circumstances discussions of evidence among jurors before the final submission of a criminal case have been deemed not to have been improper, or as not having resulted in prejudicial error where, for instance, a review of the jurors' responses to questions of the trial court indicated that the jurors' impartiality had not been affected by their discussions among themselves of certain exhibits prior to deliberations." *Cloutier,* 178 Ill.2d at 161, 227 Ill.Dec. 448, 687 N.E.2d 930, quoting 75B Am.Jur. *Trial* § 1610, at 379-80 (1992).

The circuit court deemed an inquiry among other jurors as to Juror Smith's conduct a potential "Pandora's box," because of its finding that Juror Smith had not expressly admitted to communicating to the other jurors

about her fears or the case. See, *e.g.*, *Cloutier,* 178 Ill.2d at 161, 227 Ill.Dec. 448, 687 N.E.2d 930. The court's declination to question the other jurors as to whether Juror Smith had expressed her fears or concerns was not *reversible* error. The court was in the best position to judge Juror Smith's responses. Given that Juror Smith never indicated that she actually had discussion with the other jurors about the case, its facts, or her own fears, the court did not abuse its discretion.

III

Defendant urges that he was denied a fair trial by the admission of "other crimes" evidence concerning the Judge Wilson bribe. He claims that the State presented a "mini-trial" on the issues of the bribery, therefore depriving him of a fair trial.

Although inadmissible to show a propensity to commit crimes, other crimes evidence may be admissible to show consciousness of guilt. *People v. Bean,* 137 Ill.2d 65, 107-08, 147 Ill.Dec. 891, 560 N.E.2d 258 (1990). Whether to admit or exclude other crimes evidence rests within the discretion of the circuit court and that decision will not be reversed absent abuse. *People v. Kliner,* 185 Ill.2d 81, 146, 235 Ill.Dec. 667, 705 N.E.2d 850 (1998); *People v. Illgen,* 145 Ill.2d 353, 364, 164 Ill.Dec. 599, 583 N.E.2d 515 (1991). Here, the evidence of the bribe, although prejudicial, was clearly probative and relevant to show defendant's consciousness of guilt.

Defendant claims that Cooley's testimony had attenuated probative value "since the bribe was orchestrated not by [defendant], but by third parties." The record reveals, however, that on several occasions, Cooley met with

defendant and the two discussed the bribery of Judge Wilson. Defendant's attempt to distance himself from the actual bribery falls short and is not supported by the record.

Defendant also claims that the evidence of the bribery constituted an unacceptable "mini-trial," which caused him manifest prejudice. He asserts that Cooley's testimony, rather than simply recounting the bribery, provided the jury with a story of police and judicial corruption, clandestine meetings during which payoffs took place, threats by "dangerous" people, a conspiracy in the "First Ward," and the imprisonment of a number of "First Ward" associates. The State counters that the extensive evidence of the bribery conspiracy was presented, in part, in response to defendant's theory of the case that the bribery never took place but, if it had, he did not participate.

The admission of other crimes evidence, although relevant, should not lead to a "mini-trial" of a collateral offense. *People v. Nunley,* 271 Ill.App.3d 427, 432, 208 Ill.Dec. 93, 648 N.E.2d 1015 (1995). The circuit court therefore must carefully limit the details to what is necessary to illuminate the issue for which the other crime was introduced. *People v. Bartall,* 98 Ill.2d 294, 315, 74 Ill.Dec. 557, 456 N.E.2d 59 (1983); *People v. Chambers,* 259 Ill.App.3d 631, 634-35, 197 Ill.Dec. 595, 631 N.E.2d 817 (1994). Erroneously admitted evidence of other crimes requires reversal unless the record affirmatively establishes acceptable justification. *People v. Thigpen,* 306 Ill.App.3d 29, 39, 239 Ill.Dec. 102, 713 N.E.2d 633 (1999).

In the present case, the circuit court carefully limited the evidence of the bribery, excluding all references to organized crime or defendant's connections to the "Mafia."

Further, the court explicitly instructed the jury, during Cooley's testimony and again at the close of the case, that the purpose of admitting the bribery evidence related only to defendant's consciousness of guilt and the relationships with other witnesses. Although Cooley's testimony relating the facts of the bribery was extensive, and the State focused on that evidence, it cannot be said that the court abused its discretion in allowing the bribery testimony. That testimony of necessity explicated the delay in bringing defendant to trial almost 25 years after the offense; explained defendant's initial acquittal; and ineluctably revealed defendant's consciousness of guilt. Evidence concerning the conspiracy and the individuals involved in that conspiracy was essential to explain defendant's role as a participant in the bribery of Judge Wilson. For these reasons, defendant's argument is defeated.

IV

Defendant further claims that he was denied a fair trial by the State's allegedly veiled references to organized crime.

Resolving questions concerning the admissibility of evidence rests within the sound discretion of the circuit court and its decision will not be disturbed "absent a clear abuse of discretion resulting in manifest prejudice." *People v. Lucas,* 151 Ill.2d 461, 489, 177 Ill.Dec. 390, 603 N.E.2d 460 (1992). The decision to deny a mistrial also is within the discretion of the court and will not be reversed unless a clear abuse of that discretion is manifest. *People v. Hall,* 114 Ill.2d 376, 405, 102 Ill.Dec. 322, 499 N.E.2d 1335 (1986). A mistrial should be granted only where the jury has been so influenced and prejudiced that it would not be

fair and impartial and that the damaging effect of the evidence cannot be remedied by admonitions or instructions. *People v. Camden,* 219 Ill.App.3d 124, 136, 161 Ill.Dec. 565, 578 N.E.2d 1211 (1991).

In the case *sub judice,* the circuit court excluded all references to organized crime. The court allowed references to the "First Ward" political organization, however. In compliance with this limitation, no specific "mafia" or "mob" references were made. Nevertheless, defendant insists that the State's conduct in adducing evidence, both from its own witnesses and in cross-examination of defense witnesses, injected thinly-veiled references to organized crime into the trial. Defendant also points to the State's cross-examination of defense witness Ed Whalen, Jr. in which the State asked him if he knew whether his uncle also had represented a "brother named Spilotro" and Joey Aiuppa, "a big guy in the First Ward." The State also asked Phyllis Napoles, Logan's ex-wife and defendant's cousin, if defendant's uncle was Joe Ferriola and whether Ferriola was a First Ward member.

The record clearly shows that evidence concerning the "First Ward" and its members and associates played a large part in defendant's trial. Nevertheless, defendant's contention, that only a "group of dimwits" would miss the organized crime references, must fail. Simply because certain individuals involved in the bribery conspiracy were also associated with organized crime is no reason to redact those persons from the facts of this case.

Ironically, in his assertions of error, defendant essentially attempts to rewrite history, decrying references to anyone remotely associated with organized crime; yet he used those individuals, for example, blaming Petrocelli for

Logan's murder, to fit his defense. Much of the evidence of which defendant complains was elicited through defense questioning: Cooley's gambling debts and threats received from First Ward associates were elicited on cross-examination.

Here, naming the "players" in the conspiracy and criminal plot did not constitute reversible error. Defendant's argument misses the mark.

V

Defendant next contends that he was denied a fair trial by multiple instances of improper prosecutorial argument, including inflammatory comments about defendant, attacks on defense counsels' integrity and reference to defendant's failure to testify.

A prosecutor is given considerable leeway in making closing and rebuttal argument and is allowed to argue the evidence and reasonable inferences drawn from that evidence. *People v. Gutirrez,* 205 Ill.App.3d 231, 261, 151 Ill.Dec. 395, 564 N.E.2d 850 (1990). It is entirely proper for the prosecution to denounce a defendant's behavior, engage in some degree of invective and draw inferences unfavorable to the defendant if such inferences are based upon the evidence. *People v. Bunting,* 104 Ill.App.3d 291, 296, 60 Ill.Dec. 51, 432 N.E.2d 950 (1982). In determining whether a prosecutor's closing comments are prejudicial, reference must be made to the entire argument, to the context of the language used, its relation to the evidence and the effect of the argument on the rights of the defendant to a fair and impartial trial. *People v. Kitchen,* 159 Ill.2d 1, 38-39, 201 Ill.Dec. 1, 636 N.E.2d 433 (1994). The character and scope of closing argument is left largely to

the circuit court and every reasonable presumption must be indulged that the court properly exercised its discretion. *People v. Morgan,* 112 Ill.2d 111, 113, 97 Ill.Dec. 430, 492 N.E.2d 1303 (1986). Defendant shoulders a heavy burden of persuasion in seeking to reverse a conviction on the ground of improper argument; only if the challenged remarks constituted a material factor in the conviction, without which the jury might have reached a different verdict, is reversal merited. *People v. Lann,* 194 Ill.App.3d 623, 628, 141 Ill.Dec. 283, 551 N.E.2d 276 (1990). The dispositive question in the case at bar, therefore, is whether the prosecutor's argument resulted in substantial prejudice to defendant, and constituted a material factor in his convictions without which the jury's verdict might have been different.

Here, the prosecutor's negative references to defendant were palpable; he said, "You may think you see his personality, and the way he acts over here for the show. But you know, his personality it that of a hitman." This reference to defendant as a "hitman" was an improper attempt to draw a connection between defendant and an organized crime syndicate, in circumvention of the circuit court's order barring such references. The prosecutor also exceeded the bounds of proper argument by his negative portrayal of defense counsel: "But what [defendant's] attorneys have done is not unlike want was done in 1977 when it went to trial. Different form, different style. But they don't want you to follow the law." Nothing in the evidence presented at trial or in defense argument precipitated such an argument.

Of greatest concern, however, are the prosecutor's comments that "[Defendant]'s the only one in this room who didn't come on this witness stand and talk about

accepting responsibility. And again, the defendant does not have to testify. * * * But those other witnesses told you about their accepting of their responsibility." In addition, the prosecutor theorized about the possibility of a third shot, but stated that only defendant "knows." Taken as a whole, those comments reflect a calculated attempt to draw attention to defendant's invocation of his right of refusal to testify. This line of argument had the greatest potential for prejudicing the defense and for denying defendant a fair trial. See *People v. Hawkins,* 284 Ill.App.3d 1011, 221 Ill.Dec. 447, 675 N.E.2d 642 (1996); *People v. Tipton,* 222 Ill.App.3d 657, 661-62, 165 Ill.Dec. 131, 584 N.E.2d 310 (1991).

The State attempts to minimize the nature of the argument and its effect, asserting that, because the circuit court sustained a defense objection to the State's comment on defendant's failure to testify, any error was cured. Argument made by the prosecutor, attempting to emphasize defendant's failure to testify at trial, however, clearly constituted prosecutorial misconduct. Nevertheless, those comments, to which objections were sustained by the circuit court, must be juxtaposed with the numerous instances in which both the court and the attorneys advised and instructed the jury that defendant was not required to testify. See *People v. Lawler,* 142 Ill.2d 548, 564, 154 Ill.Dec. 674, 568 N.E.2d 895 (1991) (jury instructions had curative effect on improper argument because arguments of counsel do not have the same impact on the jury as do the jury instructions); *People v. Harris,* 132 Ill.2d 366, 386, 138 Ill.Dec. 620, 547 N.E.2d 1241 (1989).

On numerous occasions during jury selection, both the circuit court and attorneys emphasized defendant's right to refuse to testify. During the second phase, or general,

voir dire, the court instructed the entire venire that defendant, innocent until the State proves him guilty beyond a reasonable doubt, need not testify. Likewise, the court and defense counsel, on a number of occasions addressed defendant's right not to testify. After the jury was selected and sworn, but before evidence was presented, the court again advised the jurors of defendant's right not to testify. Following presentation of the evidence, in the State's closing argument, the prosecutor also emphasized defendant's right not to testify: "And again * * * [defendant] doesn't have to put up a defense." Finally, the court instructed the jury as to defendant's presumption of innocence and his right not to testify: "The defendant is presumed to be innocent of the charge against him, and this presumption remains with him throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that he is guilty. The [S]tate has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the [S]tate throughout the case. The defendant is not required to prove his innocence." The court also instructed the jury: "The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." Notwithstanding the curative effect of these remarks and instructions to the jury, defendant insists he was denied a fair trial, relying upon *People v. Blue,* 189 Ill.2d 99, 244 Ill.Dec. 32, 724 N.E.2d 920 (2000).[4]

[4] In *Blue,* the supreme court held that errors committed at the defendant's trial "cast doubt upon the reliability of the judicial process"

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Unlike *Blue,* the errors attributable to the prosecutor's closing argument in the case *sub judice* did not attain the level demonstrated in *Blue* nor did those errors prejudice defendant's right to a fair trial. A review of the record reveals that, despite the conduct by the prosecutor, the evidence presented at trial overwhelmingly implicated defendant in Logan's murder. The circuit court promptly sustained objections to the improper argument and curatively instructed the jury. Accordingly, given the manifest weight of evidence demonstrating defendant's guilt, and the court's corrective measures, the prosecutor's comments cannot be said to have altered the outcome of trial.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

THEIS, P.J., and GREIMAN, J., concur.

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and "created a pervasive pattern of unfair prejudice." *Blue,* 189 Ill.2d at 139, 244 Ill.Dec. 32, 724 N.E.2d 920. Accordingly, the *Blue* court reversed the defendant's conviction for shooting and killing a police officer. Errors occurring at trial included the improper introduction and display of the dead officer's bloodied uniform, the inflammatory testimony of the victim's father highlighting the poignancy of the family's loss, the inflammatory testimony from a police commander regarding the oath which the victim took, "testifying" by the prosecutors, and improper argument by the prosecutors that the victim's family needed to "hear" from the jury and that the jury should also send a "message" of its support to the police. Finding that the cumulative effect of these errors denied the defendant a fair trial, the court further emphasized the State's "overbearing conduct in pursuit of defendant's convictions" and its unprofessional and improper behavior at trial. *Blue,* 189 Ill.2d at 140, 244 Ill.Dec. 32, 724 N.E.2d 920.